United States Court of Appeals

for the Second Circuit

APPENDIX

76-7414

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRUNSWICK CORPORATION AND
SHERWOOD MEDICAL INDUSTRIES, INC.
Counterdefendants-Appellees

v.

DAVID S. SHERIDAN AND
NATIONAL CATHETER CORPORATION
Counterclaimants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
NOV 16 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

On Appeal From the United States District Court For the Northern District of New York

JOINT APPENDIX
VOLUME I

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...ICT Court

Jury demand d...

TITLE OF CASE	ATTORNEYS
BRUNSWICK CORPORATION, A Corporation and SURGICAL MEDICAL INDUSTRIES, INC., a Corporation, Plaintiffs, v. DAVID S. HUMPHAN and NATIONAL CATHETER CORPORATION, a Corporation, Defendants	For plaintiffs: Mayer, Brown & Platt, Esqs. 231 South LaSalle Street Chicago, Illinois 60604 (Ainsworth, Sullivan, Tyler & Carey) 75 State Street, Albany, NY 12207 For defendant: Robert A. Knuti (Lord, Bissell & Brook) 115 South LaSalle Street Chicago, Illinois (Delaney, Foy, Conway & Hole-Herrin) 90 State Street, Albany, NY 12207

STATISTICAL RECORD	CLERK	DATE 1976	MADE OR RECEIPT NO	REC.	DISB
J.S. 6 mailed	Clerk	Aug 17	50788	5.00	
		20	C.D. 1119		5.00
J.S. 6 mailed	Marshal				
Date of Action:	Docket fee				
Transferred from N.Dist. of Illinois, Eastern Div. Settlement Agreement	Witness fees				
Action arose at:	Depositions				

Best Copy

[illegible] vs. David S. Sheridan et ano

PROCEEDINGS

[illegible] of order of Hon. William J. Lynch, USMJ, transferring [illegible] to
[illegible] Dist. of New York from Northern Dist. of Illinois
Certified copy of docket entries
Complaint
Motion
Affidavit pursuant to Local Rule 39
Notice for costs Bond
Summons returned served on both defendants
Summons issued David S. Sheridan and National Catheter Corporation, defendants
and attorneys
Affidavit re Rule 39
Defendants' notice of filing and proof of service
Defendants' motion to dismiss for lack of jurisdiction and improper venue or,
in the alternative, to transfer to the U.S. Dist. Court for the Nor. Dist. of Ill.
Affidavit of David S. Sheridan
Memorandum of points and authorities in support of Defendant's motion to dis-
or transfer
Plaintiff's notice of taking deposition of David S. Sheridan
Plaintiff's notice of motion
Plaintiff's motion
Stipulation
(All above incorporated under one cover)
Filed stipulation extending time to appear, answer or otherwise move to and including
January 24, 1973
Stipulation extending time to appear, answer or otherwise move to and including
Jan. 29, 1973
Stipulation and order (MacMahon) extending time to appear, answer, or otherwise
move to and including February 28, 1973
Stipulation and Order (Foley) extending time to appear, answer or otherwise move
to and including March 31, 1973
Defendants' Answer and Counterclaim
Plaintiff's Reply to Counterclaim
Notice of taking deposition
Defendants' objections to plaintiffs' production requests
Plaintiffs' Memorandum of Law in opposition to defendants' objections to produc-
tion of documents
Filed Notice of Motion w/Aff. of Svc. for order to compel production and
inspection and copying of documents, returnable September 17, 1973 at 9:30 a.m.
Notice of deposition Aug. 28, 1973 at 1:00 p.m. at Glens Falls, NY
Notice of deposition Oct. 2, 1973 at 1:00 p.m. at McGaw Park, Illinois
Notice of Motion returnable Sept. 17, 1973 at Albany Motion to quash, [illegible]
in support of motion and certificate of service
Notice of Motion returnable Sept. 17, 1973 at Albany & Certificate of Mailing
Motion for leave to file amended complaint
Memorandum in response to Defendants' Memorandum in support of motion to quash
subpoena [illegible] order compelling production for inspection, etc. Motion for order to com-
pel plaintiff's notices, etc. Motion for leave to file amended complaint. Motion
for production, denied Item 1 through 5. So ordered. Left open. Motion for order
to quash denied. Motion for leave to file amended complaint granted. Exhibit to
be filed
Notice of Deposition 10/3/73 at Glens Falls, NY
Notice of Deposition Nov. 1, 1973 at Chicago, Ill.
Summons return of service of deposition subpoena
Memorandum and order of Foley, D.J. denying motion to file amended complaint, granting
in part, denying in part the motion for production of documents, and denying
motion to quash notices to depose and/or limiting the scope of the

Available

PROCEEDINGS

1974			
Nov. 12		✓	Filed Deposition of [illegible] to, Orion Optical Supply Corporation
" 6		✓	Answer to amended complaint
" 7		✓	Deposition transcript of Dennis Grossman together with American Help
1975			Supply Deposition Exhibit No. 1, 2 and 3
May 28		✓	Deposition of David S. Sheridan taken on behalf of plaintiff Dec. 26,
June 6		✓	Plaintiffs' request for production of documents
July 11		✓	Defendants' answers to plaintiffs' interrogatories
Oct. 21		✓	Notice of Trial for November, 1974 Term of Court at Albany-Court
Dec. 26		✓	Notice of Motion returnable Jan. 6, 1975 Albany, for order st defendants' jury demand and certificate of mailing
" 26		✓	Memorandum of plaintiffs in support of motion to strike defenda jury demand
"26		✓	Affidavit in support of plaintiffs' motion to strike defendants' jury demand
Jan. 6		✓	defendant's memorandum in opposition to plaintiff's motion to st defendant's jury demand
" 6			Motion for order striking defendants' jury demand. Decision reserved. On work for plaintiff to read
" 10		✓	Filed Defendants' supplemental memorandum in opposition to plaintiffs motion for order striking defendants' jury demand
" 22		✓	Plaintiffs' Reply to Defendants' Memorandum and supplemental Memorandum in opposition to plaintiffs' Motion to strike defen jury demand
Feb. 10		✓	Notice of Deposition 2/21/75 at Albany of Isaac Jackson
" 10		✓	Notice of Motion returnable March 3, 1975 at Albany, certificate mailing and affidavit in support of motions for order compelling production of documents, answers to interrogatories and [illegible] of order of 10/15/73
" 12		✓	Note of Issue - March 1975 - Albany - Jury
" 13		✓	Memorandum-Decision and Order (2/12/75) denying motion to strik defendants' jury demand in relation to particular issues discus in Memorandum which are to be tried and submitted to a jury SO ORDERED-HON.JAMES T. FOLEY, USDJ
" 24		✓	Notice of Motion returnable March 3, 1975 at Albany, certificate service and affidavit in support of motion for separate trials liability and damages and to [illegible] amend complaint
Mar. 3			Motion for order setting separate trials on issues, etc., Motion for compelling answer to certain interrogatories, production of document First motion granted. Order submitted. Second motion adjourned to 1975 by consent
" 6		✓	Filed letter dated 3/3/75 from Ainsworth firm indicating which motio been disposed of by order of Judge Foley dated 3/3/75
" 6		✓	Order granting motion for separate trials on complaint and co claim as to liability and damages, motion to further amend co is granted, and plaintiffs' motions for orders compelling fur answers to interrogatories and production of documents are de HON.JAMES T. FOLEY
" 17			Motion for order compelling answers to certain interrogatories (2) co production of certain documents and (3) reconsidering court's orders Motions 1 and 2 disposed of in order signed by Judge Foley Mar. 3, 197 Motion #3 withdrawn per letter dated 2/24/75
June 17		✓	Note of Issue - November 1975 - Albany - Jury
July 26		✓	Filed Defendant's interrogatories to Plaintiff Shorwood Medical Ind together with certificate of Service by mail

PROCEEDINGS

26	Filed Defendant's Interrogatories to Plaintiff Brunswick Corp. together with Certificate of Service by mail
" 26	Filed Defendant's Supplemental Answers to plaintiffs' Interrogatories together with Certification of Service by mail
Sept. 8	Filed Notice of Motion returnable Sept. 15, 1975 at Albany, Defendants' for leave to file amended answer and counterclaim, defendants' answer and amended counterclaim, defendants' amended answer to plaintiffs' amended complaint, defendants' demand for jury and certificate of service of David J. Bensler
Sept. 15	Motion to File an Amended Answer & Counterclaim Granted. Submit Order
Oct. 3	Filed Answers of Brunswick Corporation to Defendants' Interrogatories
Oct. 3	Filed Answers of Sherwood Medical Industries Inc., to Defendants' Interrogatories
Nov. 4	Filed Order of Judge Foley (10/31/75) granting motion to amend answer & counterclaim with certain conditions
Nov. 12	Filed Notice of Deposition of American Hospital Supply Corp.
" 12	" Notice of Deposition of Earl Franey
Nov. 21	Filed Plaintiff's Reply to Defendants' Amended Counterclaim & Certificate of Mailing
Nov. 21	Filed Further Interrogatories to Plaintiffs to Defendants & Certificate Service
Nov. 21	Filed Request for Production of Documents Pursuant to Rule 34 of the Rules of Civil Procedure & Certificate of Service
Dec. 9	PRE-TRIAL CONFERENCE - Held.
Dec. 12	Filed Notice of Filing Depositions
Dec. 12	Filed Depositions of Eli G. Katz and John M. Jenkins, IV
Dec. 16	Case marked over the term. Clerk directed to take this case off dismissal calendar to be called on January 13, 1976
Dec. 22	Filed Note of Issue for March, 1976 Term of Court at Albany-Jury
Dec. 29	Filed depositions of D. Ross Sheridan and David S. Sheridan
Dec. 31	Filed Defendant's Answers to Plaintiffs further Interrogatories & Cert.
Dec. 31	Filed stipulation
Dec. 31	Filed notice of deposition of Robert Reardon & certificate of service
Dec. 31	Filed notice of deposition of Mr. John Jenkins and notice of deposition of Mr. John N. Willman & certificate of service
Dec. 31	Filed notice of depositions of Robert Muldoon, William Knebel and Stanley Garber & certificate of service
1976	
Jan. 22	Filed Deposition of Robert F. Reardon, JR.
Jan. 13	Off dismissal calendar.
Jan. 28	Filed Deposition of Stanley M. Garber & Affidavit of Richard E. Schroder
" 28	Filed Deposition of Robert Steven Muldoon & Affidavit of Richard E. Schroder
" 28	Filed Deposition of George William Knebel taken on behalf of the defendant & Affidavit of Richard F. Schroder
Jan. 30	Filed request for production of documents for inspection and copying & certificate of service
Feb. 4	Filed Deposition of John N. Willman
Feb. 20	Filed Plaintiffs' Response to Defendants Request for Production of Documents for Inspection and Copying & certificate of service
Mar. 16	Filed Plaintiffs' Pre-Trial Brief
Mar. 17	Filed Deposition of Henry Barclay Franey, Jr.
Mar. 29	TRIAL. Jury drawn and sworn. Case to be tried in total, not bifurcated as the order indicates, by consent. Witness for Plaintiff.
Mar. 30	TRIAL CONTINUED. Witness for Plaintiff
Mar. 31	TRIAL CONTINUED. Witness for Plaintiff.

1E

CIVIL ACTION NO. [illegible]

PROCEEDINGS

	Filed Memorandum in response to defendants memorandum, etc.
	Filed Memorandum in response to defendant's motion, etc.
	Filed Praecipe for plaintiff
Apr. 7	TRIAL CONTINUED. Witness for Plaintiff.
Apr. 8	TRIAL CONTINUED. Witness for Plaintiff. Defendant moves for a directed verdict on plaintiff's complaint-Decision Reserved. Witness for plaintiff
Apr. 9	TRIAL CONTINUED. Witness for Defendant.
Apr. 11	Filed Outline of Issues by Defendant
Apr. 12	TRIAL CONTINUED. Witnesses for Defendant.
Apr. 13	TRIAL CONTINUED. Witness for Defendant. Reading of Depositions.
Apr. 14	TRIAL CONTINUED. Reading of Depositions, continued. Witness for defendant
Apr. 15	TRIAL CONTINUED. Witness for Defendant.
Apr. 16	TRIAL CONTINUED. Reading of Interrogatories by Mr. Hensler, Witness for Plaintiff. Plaintiff moves for Directed Verdict. Decision Reserved
Apr. 16	Filed Motion for Directed Verdict
Apr. 16	Filed Memorandum in Support of Plaintiff's motion for directed verdict
Apr. 19	TRIAL CONTINUED. Plaintiff moves for a directed verdict and entry of judgment dismissing counts 1, 2, 3, and 4 of defendants amended counterclaim. Granted as to Counts 1, 3 and 4. Denied as to Count 2. Plaintiff moves for a directed verdict to strike certain testimony-denied. Defendant moves for directed verdict as to Brunswick-Reserved. Defendant moves for directed verdict as to Sherwood.-Reserved. Defendant moves to strike all evidence of damages of $100,000.00-Denied.0
Apr. 20	TRIAL CONTINUED. The Court rules on defendants request to charge, so & so and. Plaintiff's proposed general instruction No. 3-Refused. Plaintiff's proposed special interrogatory No. 5-Refused. Plaintiff's proposed instruction in re: North American Instrument Corporation Incident.
Apr. 21	TRIAL CONTINUED. Judge Foley charged the Jury
Apr. 22	TRIAL CONTINUED.
Apr. 22	Filed Court Exhibit #1 - Jury Note
	" " #2 - Jury Note
Apr. 23	TRIAL CONTINUED.
Apr. 19	Filed Supplementary Memorandum in support of Defendant-Counterclaimants motion for Directed Verdict on liability and in opposition to Plaintiff Counter-Defendants Motion for Directed Verdict.
Apr. 19	Filed Special Interrogatories submitted on behalf of Defendants and Counterclaimants'.
Apr. 20	Filed Defendants Proposed Instruction #23.
Apr. 20	Filed Defendants Supplemental Interrogatory.
Apr. 20	Filed Defendants Proposed Instruction #24.
Apr. 20	Filed Defendants Proposed Instruction #20.
Apr. 20	Filed Defendants Proposed Instruction #22.
Apr. 21	Filed Defendants Proposed Instruction #21.
Apr. 21	Filed Plaintiffs Proposed General Instruction #3.
Apr. 21	Filed Defendants Proposed Special Interrogatory #5.
Apr. 21	Filed Plaintiffs Proposed Instruction in re North American Instrument Corporation Incident.
Apr. 26	Filed Court Exhibit #3.
Apr. 26	Filed Court Exhibit #4.
Apr. 26	Filed Court Exhibit #5.
Apr. 26	Filed Interrogatories - Special Verdict.
Apr. 26	TRIAL CONTINUED. The Jury is unable to agree upon a verdict in this A mistrial is declared. The Jury is excused.

1976

July 21 Filed letter from Plaintiff's Attorney's to Judge Foley dated
July 21 Filed letter from Plaintiff's Attorney's to Judge Foley dated
July 21 Filed letter from Defendant's Attorney's to Judge Foley dated
July 23 Filed letter from Defendant's Attorney's to Judge Foley dated
July 23 Filed Defendant's Amended Answer & Amended Counterclaim, Jury
Certificate of Service
July 22 Filed Memorandum-Decision of Judge Foley (7/22/76)
July 22 Filed Order of Judge Foley (7/22/76) directing to enter a final
Judgment on Defendant's counterclaimants on Counts I, III and IV of
July 22 Filed Judgment and Billed cards, for Judgment to Mayer, Brown,
and Platt and Carzoon, Mons.
Aug. 11 Filed transcript of proceedings held April 19, 1976 at Albany,
Hon. Foley
Sep. 17 Filed Notice of Appeal by defendants
Sept. 1 Filed Bond on Appeal

16

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORP. AND SHERWOOD MEDICAL, IND., INC.
Plaintiff-Appellant

vs

DAVID S. SHERIDAN AND NATIONAL CATHETER CORP.
Defendant-Appellee

Northern District of New York
Civil No. 72-CV-522

I, J. B. Scully, Clerk of the District Court of the United States for the Northern District of New York, DO HEREBY CERTIFY that the foregoing docket entries and original papers numbered from 1 to 398 inclusive, constitute the Record on Appeal in the above entitled action; and

I DO FURTHER CERTIFY that the time to file the Record of Appeal expires September 26, 1976.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereto affixed at the City of Utica, New York, this 4th day of October, 1976.

J. B. SCULLY, CLERK
U. S. District Court

By: Allen B. Doggett
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORPORATION, and SHERWOOD MEDICAL INDUSTRIES, INC., Plaintiffs	)	
v.	)	CIVIL ACTION NO.
DAVID S. SHERIDAN, and NATIONAL CATHETER CORPORATION, Defendants	)	72CV 522

AMENDED COMPLAINT

Plaintiffs, Brunswick Corporation and Sherwood Medical Industries Inc., by their attorneys, complain against defendants David S. Sheridan and National Catheter Corporation as follows:

COUNT I

1. Brunswick Corporation is a Delaware corporation having its principal place of business in Chicago, Illinois ("Brunswick"

2. Sherwood Medical Industries Inc. is a Delaware corporation having its principal place of business in St. Louis, Missouri ("Sherwood").

3. Sherwood is a subsidiary of Brunswick, Brunswick owning over 80% of the common stock of Sherwood. Sherwood manufactures and sells catheters and medical tubing which have become well kno and favorably accepted by physicians and hospitals throughout the United States. Sherwood's catheter and tubing products are sold to hospital supply distributors throughout the United States.

4. David S. Sheridan is a citizen of the State of New York residing in North Argyle, New York ("Sheridan").

5. National Catheter Corporation is a New York corporation with its principal place of business in North Argyle, New York ("National Catheter").

6. Sheridan is the President and a principal shareholder of National Catheter.

7. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000).

8. On May 28, 1971, Brunswick, Sherwood, Sheridan and National Catheter executed a certain settlement agreement, a copy of which is attached hereto as Exhibit A and incorporated by reference herein.

9. Among the considerations included in the May 28, 1971 agreement was the sum of $100 000 paid by Sherwood to Sheridan.

10. Pursuant to paragraph 5(b) of the agreement of May 28, 1971, both Sheridan and National Catheter agreed that until May 28, 1976, they would neither:

> ". . . directly or indirectly, whether as owner, employee, officer, director, advisor or in any other capacity, do any of the following, nor assist or enable (whether by sale of an invention or otherwise) any person, corporation or other business entity to do any of the following:
>
> * * *
>
> (b) manufacture, have manufactured, use, sell or otherwise deal in flexible tubing made by any process . . . incorporating features or configuration of an x-ray or conductive line similar to the products manufactured by Sherwood as of February 1969".

11. Commencing at a time unknown to plaintiffs, and at all times thereafter, defendants have manufactured and sold flexible tubing which incorporates the features or configuration of a conductive line similar to the conductive line flexible tubing manufactured and sold by plaintiffs as of February 1969.

12. The manufacturing, selling, offering for sale and dealing in flexible tubing by Sheridan and National Catheter, as set forth in paragraph 11 of this Count I, constitutes a breach b

Sheridan and National Catheter of their May 28, 1971 agreement with Brunswick and Sherwood.

13. Defendants, despite demands by plaintiffs, have refused to cease manufacturing, selling, offering for sale and dealing in flexible tubing incorporating the features or configuration of a conductive line similar to that manufactured by Sherwood as of February 1969.

14. The aforesaid wrongful acts of defendants threaten to result in great damage to plaintiffs and if not promptly discontinued or enjoined will cause irreparable injury to plaintiffs.

WHEREFORE, plaintiffs pray for the following relief:

1. That defendants be enjoined, temporarily during the pendency of this action, and permanently after final hearing, from directly or indirectly, whether as owner, employee, officer, director, advisor or in any other capacity, and assisting or enabling (whether by sale of an invention or otherwise) any other person, corporation or other business entity, manufacturing, usin selling or otherwise dealing in flexible tubing made by any proce incorporating features or configuration of a conductive line similar to the products manufactured by Sherwood as of February 1969, and enjoined from breaching the settlement agreement of May 28, 1971 in any other respect.

2. That defendants be required to account to plaintiffs fo all profits realized by reason of defendants' sale of flexible tubing incorporating the features or configuration of a conductiv line similar to the products manufactured by Sherwood as of February 1969.

3. That defendants pay to plaintiffs the costs of this action.

4. That plaintiffs be awarded such additional relief as may be just under the circumstances.

COUNT II

1-9. As paragraphs 1-9 of this Count II, plaintiffs incorporate herein by this reference paragraphs 1-9 of Count I.

10. Pursuant to paragraph 5(b) of the agreement of May 28, 1971, both Sheridan and National Catheter agreed that until May 2[illegible] 1976, they would neither:

> ". . .directly or indirectly, whether as owner, employee, officer, director, advisor or in any other capacity, do any of the following, nor assist or enable (whether by sale of an invention or otherwise) any person, corporation or other business entity to do any of the following:
>
> * * *
>
> (b) manufacture, have manufactured, use, sell or otherwise deal in flexible tubing made by any process in which the wall thickness of the tubing or the inner and/or outer diameters of the tubing is/are controlled so as to incorporate the features or configuration of an integral bubble or funnel similar to those manufactured by Sherwood as of February 1969. . . ."

11. On information and belief, commencing at a time unknown to plaintiffs, and at all times thereafter, defendants have manufactured and sold flexible tubing in which the inner and/or outer diameters of the tubing are controlled so as to incorporate the configuration of a funnel similar to those manufactured by Sherwood as of February 1969.

12. The manufacturing, selling, offering for sale and dealing in flexible tubing by Sheridan and National Catheter, as set forth in paragraph 11 of this Count II, constitutes a breach by Sheridan and National Catheter of their May 28, 1971 agreement with Brunswick and Sherwood.

13. Defendants, despite demands by plaintiff, have refused to cease manufacturing, selling, offering for sale and dealing in flexible tubing in which the inner and/or outer diameters of the tubing are controlled so as to incorporate the configuration of a funnel similar to those manufactured by Sherwood as of February 1969.

14. The aforesaid wrongful acts of defendants threaten to result in great damage to plaintiffs and if not promptly discontinued or enjoined will cause irreparable injury to plaintiffs.

WHEREFORE, plaintiffs pray for the following relief:

1. That defendants be enjoined, temporarily during the pendency of this action, and permanently after final hearing from directly or indirectly, whether as owner, employee, officer, director, advisor or in any other capacity, and assisting or enabling (whether by sale of an invention or otherwise) any other person, corporation or other business entity, manufacturing, using, selling or otherwise dealing in flexible tubing made by any process in which the wall thickness of the tubing or the inner and/or outer diameters of the tubing are controlled so as to incorporate the features or configuration of a funnel similar to those manufactured by Sherwood as of February 1969, and enjoined from breaching the settlement agreement of May 28, 1971 in any other respect.

2. That defendants be required to account to plaintiffs for all profits realized by reason of defendants' sale of flexible tubing as described in the immediately preceding paragraph.

3. That defendants pay to plaintiffs the costs of this action.

4. That plaintiffs be awarded such additional relief as may be just under the circumstances.

Respectfully submitted,

AINSWORTH, SULLIVAN, TRACY & KNAUF
State Bank Building
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Albany, New York 12207

By_____
John E. Knauf

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By_____
Watson B. Tucker

Attorneys for Plaintiffs and Counter-defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORPORATION and SHERWOOD MEDICAL INDUSTRIES, INC., Plaintiffs, vs. DAVID S. SHERIDAN and NATIONAL CATHETER CORPORATION, Defendants.	No. 72 CV 522

DEFENDANTS' AMENDED ANSWER
AND AMENDED COUNTERCLAIM

DEFENDANTS' AMENDED ANSWER
TO PLAINTIFFS' AMENDED COMPLAINT

In answer to the amended complaint of plaintiffs Brunswick Corporation (hereinafter "Brunswick") and Sherwood Medical Industries, Inc. ("Sherwood"), defendants David S. Sheridan ("Sheridan") and National Catheter Corporation ("National Catheter") state the following:

First Defense

The amended complaint fails to state a claim upon which relief could be granted.

Second Defense

Paragraph 5B of the May 28, 1971 settlement agreement, as it has been construed by the plaintiffs, would be violative of the federal antitrust laws and, hence, unenforceable.

Third Defense

Paragraph 5B of the May 28, 1971 settlement agreement, as it has been construed by the plaintiffs, would be so broad as to

be void as violative of public policy and, hence, unenforceable.

Fourth Defense

Plaintiffs are barred by unclean hands from seeking or obtaining the equitable relief requested in the amended complaint.

Fifth Defense

1. Defendants admit the allegations in paragraphs 1 and 2 of the amended complaint.

2. Defendants admit that Sherwood manufactures and sells catheters. Defendants lack information sufficient to form a belief as to the remaining allegations in paragraph 3 and, hence, deny those allegations.

3. Defendants admit the allegations in paragraphs 4, 5, 6 and 7 of the amended complaint but aver that Sheridan ceased to be a shareholder of National Catheter on or about July 29, 1974.

4. Defendants admit that Brunswick, Sherwood, Sheridan and National Catheter executed the settlement agreement dated May 28, 1971, a copy of which is attached to the amended complaint as Exhibit A.

5. Defendants admit that $100,000 was to be paid to Sheridan by Sherwood under the settlement agreement, but the defendants aver that the agreement speaks for itself and, hence, deny the remaining allegations in paragraph 9.

6. Defendants admit that the language quoted in paragraph 10 appears in the settlement agreement, but the defendants aver that the agreement speaks for itself and, hence, deny the remaining allegations in paragraph 10 of Count I.

7. Defendants deny the allegations in paragraphs 11, 12, 13 and 14 of Count I and specifically deny that the conductive line tubing manufactured by National Catheter incorporates the features

or configuration of the conductive line tubing manufactured by plaintiffs. Defendants aver that, except for characteristics common to all flexible, plastic conductive line tubing, the National Catheter conductive line tubing has no characteristics similar to those of the plaintiffs' tubing.

8. The allegations in Count II of the plaintiffs' amended complaint require no response because this Count was deleted, upon the plaintiffs' motion and with the defendants' consent, by order of this Court dated March 3, 1975.

9. Defendants deny all other allegations not already specifically answered herein.

DEFENDANTS' AMENDED COUNTERCLAIM

Pursuant to Rule 13 of the Federal Rules of Civil Procedure, defendants Sheridan and National Catheter assert the following counterclaim against plaintiffs Brunswick and Sherwood:

Count I

(For Treble Damages, Costs, Attorneys Fees and Injunctive Relief for Violation of the Federal Antitrust Laws)

1. This counterclaim is brought under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to obtain treble damages, costs, reasonable attorneys' fees and injunctive relief for plaintiffs' violation of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2). This counterclaim is also brought to obtain damages and injunctive relief for unfair competition and for tortious interference with contract and with existing and prospective business relationships. The amount in controversy exceeds $10,000, exclusive of interest and costs, and jurisdiction over the counterclaim is vested in this Court under 28 U.S.C. §§ 1332 and 1337.

2. Plaintiff Brunswick is a Delaware corporation having its principal place of business in Chicago, Illinois. Plaintiff Sherwood is a Delaware corporation having its principal place of business in St. Louis, Missouri.

3. Brunswick holds the right, by license from defendant Sheridan, to exploit certain Sheridan patents concerning medico-surgical catheters and tubing. Sherwood is engaged in the manufacture and sale of medico-surgical catheters and tubing and, with Brunswick's permission, uses certain Sheridan patents which have been licensed to Brunswick.

4. Defendant Sheridan is a citizen of New York residing in and engaged in business in North Argyle, New York. Defendant National Catheter is a New York corporation with its principal place of business in North Argyle, New York.

5. Defendants Sheridan and National Catheter are engaged in the development, manufacture and sale of medico-surgical catheters and tubing.

6. In the course and conduct of their businesses all parties to this counterclaim are engaged in interstate commerce, and the wrongful acts and practices of Brunswick and Sherwood which are the subjects of this counterclaim have a direct and substantial effect upon interstate commerce.

7. In settlement of claims asserted in a complaint and counterclaim in an action styled Brunswick Corporation, et al. v. David S. Sheridan, et al. (Civil Action No. 68-CV-25, United States District Court for the Northern District of New York) the parties to this counterclaim entered into the May 28, 1971 agreement which is attached to the amended complaint in this action as Exhibit A. Paragraph 5 of that agreement provides, in pertinent part, that

> For a period of five years from the date hereof, neither Sheridan nor National Catheter shall, directly or indirectly, whether as owner, employee, officer, director, advisor or in any other capacity, do any of the following, nor assist or enable (whether by sale of an invention or otherwise) any person, corporation or other business entity to do any of the following: . . .
>
> > (b) manufacture, have manufactured, use, sell or otherwise deal in flexible tubing made by any process in which the wall thickness of the tubing or the inner and/or outer diameters of the tubing is/are controlled so as to incorporate the features or configuration of an integral bubble or funnel similar to those manufactured by Sherwood as of February 1969, or incorporating features or configuration of an x-ray or conductive line similar to the products manufactured by Sherwood as of February 1969.

This provision was included in the agreement at the insistence of Brunswick and Sherwood.

8. Plaintiffs have adopted an improperly broad and expansive interpretation of Paragraph 5 of the settlement agreement, and that paragraph, as construed and sought to be enforced by plaintiffs, would constitute a contract unreasonably in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1 [1970]).

9. Plaintiffs have combined and conspired to misuse Paragraph 5 to prevent defendants from competing with plaintiffs in the manufacture and sale of medical tubing. This combination and conspiracy is unreasonably in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1 [1970]).

10. Plaintiffs have combined and conspired to institute the instant action against defendants in a purported effort to enforce Paragraph 5 of the agreement. Plaintiffs seek by their action to prohibit defendants from competing with plaintiffs in the manufacture

and sale of conductive tubing. This combination and conspiracy is unreasonably in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1 [1970]).

11. Plaintiffs have also combined and conspired to contact various companies and enterprises who were engaged in or considering business transactions with defendants. Plaintiffs have on such occasions threatened, coerced, persuaded or attempted to persuade such companies or enterprises not to do business with defendants. This combination and conspiracy is unreasonably in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1 [1970]), and the result of the combination and conspiracy was to bring about concerted refusals to deal with defendants, also in violation of Section 1 of the Sherman Act (15 U.S.C. § 1 [1970]).

12. The motive, purpose and intent in each of the practices and acts of plaintiffs alleged hereinbefore in paragraphs 8-11 was to destroy the business of defendants and to prevent or restrict defendants from competing with plaintiffs.

13. For a period at least since September 1967 to the present, plaintiffs have been engaged in a continuing combination and conspiracy with each other and with others to restrain and limit competition in and to attempt to monopolize the development, manufacture and sale of catheters and medical tubing in the United States, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2 [1970]). The primary goal of plaintiffs' continuing combination and conspiracy has been and is to restrict the ability of defendants to compete in the development, manufacture and sale of catheters and medical tubing and, ultimately, to destroy the business of defendants. Each of the acts and practices of plaintiffs

alleged above in paragraphs 8-11 was committed in furtherance of plaintiffs' continuing combination and conspiracy, and with the specific intent to achieve the unlawful aims and purposes of the combination and conspiracy.

14. As a direct and proximate consequence of the acts and practices alleged hereinbefore, defendants have sustained serious and substantial injury to their business and property. Defendants have been prevented from making sales, suffering thereby the loss of profits from such sales, and have been delayed and prevented from developing products, entering markets and expanding their business. The amount of damages sustained by defendants is in excess of $5,000,000.

15. Unless plaintiffs are restrained and prohibited from continuing their unlawful practices, defendants will continue to suffer continuing damages to their business, and defendants have no adequate remedy at law with respect to such continuing violations.

Count II

(For Damages and Injunctive Relief for Tortious Interference with Contract)

16. In support of their claims for damages and injunctive relief for tortious interference with contract, defendants reallege and incorporate herein by reference paragraphs 1 through 13 of this counterclaim.

17. By contract with American Hospital Supply Corporation ("AHSC") dated April 1, 1971, defendants agreed to supply medico-surgical catheters and tubing to AHSC in accordance with purchase orders to be issued by AHSC. Subsequently, on December 1, 1971 and April 18, 1972, respectively, AHSC issued purchase orders 90-0904 and 90-77361 for conductive line tubing have a wholesale value of

approximately $80,000. AHSC also advised the defendants, by letter dated April 18, 1972, of its intention to introduce the defendants' full line of conductive line tubing supported by sample kits, product literature, catalogue sheets and advertising in AHSC's June 1972 Bulletin which would be sent to 30,000 hospital buyers.

18. Thereafter, the plaintiffs, with knowledge of the contracts between AHSC and the defendants, and without privilege or justification, engaged in various acts for the purpose of intentionally and maliciously inducing AHSC to breach its contracts with the defendants. These actions included telephone calls and correspondence, in April and May 1972, from Sherwood's president to the executive vice president and marketing vice president of AHSC for the stated purpose of enabling AHSC to avoid any "legal entanglement" in a suit which Brunswick and Sherwood planned to bring against Sheridan and National Catheter.

19. The real purpose of the plaintiffs' communications to AHSC and of their other wrongful acts was to induce AHSC to breach its contracts with Sheridan and National Catheter. As a proximate result of the plaintiffs' actions, AHSC did breach its contracts with defendants by refusing to accept delivery of the conductive line tubing which it had ordered until December 1972 and by delaying any further orders for conductive line tubing for approximately seven and one-half months.

20. The damages sustained by the defendants because of the wrongful acts of the plaintiffs described above total approximately $1,000,000, and, unless the plaintiffs are enjoined from continuing their wrongful actions, the defendants will suffer further damage for which they have no adequate remedy at law.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

$ 500

72-CV- 522

Jury demand date:

C. Form No. 106 Rev.

1-A

TITLE OF CASE	ATTORNEYS
BRUNSWICK CORPORATION, a Corporation and SHERWOOD MEDICAL INDUSTRIES, INC., a Corporation, Plaintiffs v. DAVID S. SHERIDAN and NATIONAL CATHETER CORPORATION, a Corporation, Defendants	For plaintiff: Mayer, Brown & Platt, Esqs. 231 South LaSalle Street Chicago, Illinois 60604 (Ainsworth, Sullivan, Tracy & Knauf, Esq 75 State Street, Albany, New York 12207 For defendant: Robert A. Knuti (Lord, Bissell & Brook 135 South LaSalle Street Chicago, Illinois (DeGraff, Foy, Conway & Holt-Harris) 90 State Street, Albany, NY 12207

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed	Clerk	1976 Aug. 17	50788	5 00	
		" 20	C.D.#119		5 00
6 mailed	Marshal				
is of Action:	Docket fee				
sferred from N.Dist. f Illinois, Eastern v.- Settlement Agreement,	Witness fees				
ion arose at:	Depositions				

72-CV- 522

Brunswick Corp. et ano vs. David S. Sheridan et ano

DATE 1972	PROCEEDINGS	Date Order Judgment No
Nov. 16	Filed certified copy of Order of Hon. William J. Lynch, USDJ, transferring case fo. Northern District of New York from Northern Dist. of Illinois	
	certified copy of docket entries	
	complaint	
	designation	
	three affidavits pursuant to General Rule 39	
	Security for costs Bond	
	summons returned served on both defendants	
	appearance of David S. Sheridan and National Catheter Corporation, defendants and attorneys	
	affidavit re Rule 39	
	Defendants notice of filing and proof of service	
	Defendants motion to dismiss for lack of jurisdiction and improper venue or, in the alternative, to transfer to the U.S. Dist. Court for the NDNY and supp	
	affidavit of David S. Sheridan	
	Memorandum of points and authorities in support of Defendant's motion to dism or transfer	
	Plaintiff's notice of taking deposition of David S. Sheridan	
	Plaintiffs notice of motion	
	Plaintiffs motion	
	Stipulation	
	(all above incorporated under one cover)	
Dec. 11 1973	Filed stipulation extending time to appear, answer or otherwise move to and includ January 5, 1973	
Jan. 22	" stipulation extending time to appear, answer or otherwise move to and includ Jan. 29, 1973	
Feb. 9	" Stipulation and order (MacMahon) extending time to appear, answer, or otherwi move to and including February 28, 1973	
Mar. 9	" Stipulation and Order (Foley) extending time to appear, answer or otherwise to and including March 31, 1973	
" 30	" Defendants' Answer and Counterclaim	
May 15	" Plaintiffs' Reply to Counterclaim	
" 15	" Notice of taking deposition	
June 15	" Defendants' objections to plaintiffs' production requests	
" 26	" Plaintiffs' Memorandum of Law in opposition to defendants' objections to prod of documents	
Jul. 11	" Filed Notice of Motion w/Aff. of Svc. for order to compel production and inspection and copying of documents, returnable September 17, 1973 at Alb.	
Aug. 22	" Notice of deposition Aug. 28, 1973 at 1:00 p.m. at Glens Falls, NY	
" 24	" Notice of deposition Oct. 2, 1973 at 1:00 p.m. at McGaw Park, Illinois	
" 27	" Notice of Motion returnable Sept. 17, 1973 at Albany, Motion to quash, memoran in support of motion and certificate of service	
Sept. 4	" Notice of Motion returnable Sept. 17, 1973 at Albany & Certificate of Mailin	
" 4	" Motion for leave to file amended complaint	
" 7	" Memorandum in response to Defendants' Memorandum in support of motion to quas	
" 17	Motion for order compelling production for inspection.etc., motion for order to qua plaintiffs notices, etc. Motion for leave to file amended complaint. Motion for production. denied Item 1 through 5. No. 7 left open. Motion for order quash denied. Motion for leave to file amended complaint granted. submit o	
" 27	Filed Notice of Deposition 10/3/73 at Glens Falls, NY	
Oct. 3	" Notice of Deposition Nov. 1, 1973 at Chicago, Ill.	
" 3	" xMarshalls return of service of deposition subpoena	
Oct. 17	Filed Order, Foley, D.J. granting motion to file amended complaint, granting in part and denying in part the motion for production of documents, and denying in part motion to quash notices to depose and/or limiting the scope of the depositions.	

DATE	PROCEEDINGS	Date Order Judgment N
1973		
Nov. 12	Filed Deposition Subpoena to American Hospital Supply Corporation	
Dec. 6	" answer to amended complaint	
" 7	" deposition transcript of Frederic Grossman together with American Hospital Supply Deposition Exhibit No. 1, 2 and 3	
1974		
May 28	" Deposition of David S. Sheridan taken on behalf of plaintiff Mar. 28, 1974	
June 4	" Plaintiffs' request for production of documents	
July 16	" Defendants' answers to plaintiffs' interrogatories	
Oct. 21	" Note of Issue for November, 1974 Term of Court at Albany-Court	
Dec. 26	" Notice of Motion returnable Jan. 6, 1975 at Albany, for order striki defendants' jury demand and certificate of mailing	
" 26	" Memorandum of plaintiffs in support of motion to strike defendants' jury demand	
"26	" Affidavit in support of plaintiffs' motion to strike defendants'	
1975	jury demand	
Jan. 6	" defendant's memorandum in opposition to plaintiff's motion to strike defendant's jury demand	
" 6	Motion for order striking defendants' jury demand. Decision reserved. One week for plaintiff to reply	
" 10	Filed Defendants' supplemental memorandum in opposition to plaintiffs' motion for order striking defendants' jury demand	
" 22	" Plaintiffs' Reply to Defendants' Memorandum and supplemental Memorandum in opposition to plaintiffs' Motion to strike defendants' jury demand	
Feb. 10	" Notice of Deposition 2/21/75 at Albany of Isaac Jackson	
" 10	" Notice of Motion returnable March 3, 1975 at Albany, certificate of mailing and affidavit in support of motions for order compelling production of documents, answers to interrogatories and reconsiderati of order of 10/15/73	
" 12	" Note of Issue - March 1975 - Albany - Jury	
" 13	" Memorandum-Decision and Order (2/12/75) denying motion to strike defendants' jury demand in relation to particular issues discussed in Memorandum which are to be tried and submitted to a jury- SO ORDERED-HON.JAMES T. FOLEY, USDJ	
" 24	" Notice of Motion returnable March 3, 1975 at Albany, certificate of service and affidavit in support of motion for separate trials on Liability and Damages and to further amend complaint	
Mar. 3	Motion for Order setting separate trials on issues,etc., Motion for Order compelling answer to certain interrogatories, production of documents,etc. First motion granted. Order submitted. Second motion adjourned to March 1975 by consent	
" 6	Filed letter dated 3/3/75 from Ainsworth firm indicating which motions hav been disposed of by order of Judge Foley dated 3/3/75	
" 6	" Order granting motion for separate trials on complaint and counter-claim as to liability and damages; motion to further amend complai is granted, and plaintiffs' motions for orders compelling further answers to interrogatories and production of documents are denied HON.JAMES T. FOLEY	
" 17	Motion for order compelling answers to certain interrogatories,(2) compell production of certain documents and (3) reconsidering court's orderof 10/ Motions 1 and 2 disposed of in order signed by Judge Foley Mar.3, 1975. Motion #3 withdrawn per letter dated 2/24/75	
June 17	Filed Note of Issue - November 1975 - Albany - Jury	
ug. 26	Filed Defendant's Interrogatories to Plaintiff Sherwood Medical Ind., Inc together with Certificate of Service by mail	

DATE 1975	PROCEEDINGS	Date Or Judgmen
Aug. 26	Filed Defendant's Interrogatories to Plaintiff Brunswick Corp. together with Certificate of Service by mail	
" 26	Filed Defendant's Supplemental Answers to plaintiffs' Interrogatories together with Certificate of Service by mail	
Sept. 8	Filed Notice of Motion returnable Sept. 15, 1975 at Albany, Defendants' M for leave to file amended answer and counterclaim, defendants' amended answer and amended counterclaim, defendants' amended answer to plaintif amemded complaint, defendants' demand for jury and certificate of servi of David J. Hensler	
Sept. 15	Motion to file an Amended Answer & Counterclaim Granted. Submit Order	
Oct. 3	Filed Answers of Brunswick Corporation to Defendants' Interrogatories	
Oct. 3	Filed Answers of Sherwood Medical Industries Inc., to Defendants' Interrogatories	
Nov. 4	Filed Order of Judge Foley (10/31/75) granting motion to amend answer & Counterclaim with certain conditions	
Nov. 12	Filed Notice of Deposition of American Hospital Supply Corp.	
" 12	" Notice of Deposition of Bart Franey	
Nov. 21	Filed Plaintiff's Reply to Defendants' Amended Counterclaim & Certificate of Mailing	
Nov. 21	Filed Further Interrogatories to Plaintiffs to Defendants & Certificate of Service	
Nov. 21	Filed Request for Production of Documents Pursuant to Rule 34 of the Feder Rules of Civil Procedure & Certificate of Service	
Dec. 9	PRE-TRIAL CONFERENCE- 1 hr.	
Dec. 12	Filed Notice of Filing Depositions	
Dec. 12	Filed Depositions of Eli G. Katz and John M. Jenkins, IV	
Dec. 16	Case marked over the term. Clerk directed to take this case off dismissal calendar to be called on January 13, 1976	
Dec. 22	Filed Note of Issue for March, 1976 Term of Court at Albany-Jury	
Dec. 29	Filed depositions of D. Ross Sheridan and David S. Sheridan	
Dec. 31	Filed Defendant's Answers to Plaintiffs further interrogatories & Cert. o	
Dec. 31	Filed stipulation	
Dec. 31	Filed notice of deposition of Robert Reardon & certificate of service	
Dec. 31	Filed notice of deposition of Mr. John Jenkins and notice of deposition of Mr. John N. Willman & certificate of service	
Dec. 31	Filed notice of depositions of Robert Muldoon, William Knebel and Stanley Garber & certificate of service	
1976		
Jan. 22	Filed Deposition of Robert F. Reardon, Jr.	
Jan. 13	Off dismissal calendar.	
Jan. 28	Filed Deposition of Stanley M. Garber & Affidavit of Richard E. Schroeder	
" 28	Filed Deposition of Robert Steven Muldoon & Affidavit of Richard E. Schro	
" 28	Filed Deposition of George William Nebel taken on behalf of the defendant & Affidavit of Richard E. Schroeder	
Jan. 30	Filed request for production of documents for inspection and copying & certificate of service	
Feb. 4	Filed Deposition of John N. Willman	
Feb. 20	Filed Plaintiffs' Response to Defendants Request for Production of Documents for Inspection and Copying & certificate of service	
Mar. 16	Filed Plaintiffs' Pre-Trial Brief	
Mar. 17	Filed Deposition of Henry Bartley Franey, Jr.	
Mar. 29	TRIAL. Jury drawn and Sworn. Case to be tried in total, not bifurcated as the order indicates, by consent. Witness for Plaintiff.	
Mar. 30	TRIAL CONTINUED. Witnesses for Plaintiff	
Mar. 31	TRIAL CONTINUED. Witness for Plaintiff.	

DATE 1976	PROCEEDINGS	Date Judgm
Apr. 6	Filed Memorandum in response to defendants memorandum, etc.	
Apr. 6	Filed Plaintiff's memorandum in response to defendant's memoranda, etc.	
Apr. 6	TRIAL - witnesses for plaintiff	
Apr. 7	TRIAL CONTINUED. Witness for Plaintiff.	
Apr. 8	TRIAL CONTINUED. Witness for plaintiff. Defendant moves for a directed verdict on plaintiff's complaint-Decision Reserved. Witness for Defendant	
Apr. 9	TRIAL CONTINUED. Witness for Defendant.	
Apr. 14	Filed Outline of Issues by Defendant	
Apr. 12	TRIAL CONTINUED. Witnesses for Defendant.	
Apr. 13	TRIAL CONTINUED. Witness for Defendant. Reading of Depositions.	
Apr. 14	TRIAL CONTINUED. Reading of Depositions, continued. Witness for Defendant	
Apr. 15	TRIAL CONTINUED. Witness for Defendant	
Apr. 16	TRIAL CONTINUED. Reading of Interrogatories by Mr. Hensler. Witness for Plaintiff. Plaintiff moves for Directed Verdict. Decision Reserved.	
Apr. 16	Filed Motion for Directed Verdict	
Apr. 16	Filed Memorandum in Support of Plaintiff's motion for directed verdict	
Apr. 19	TRIAL CONTINUED. Plaintiff moves for a directed verdict and entry of judgment dismissing counts 1,2,3, and 4 of defendants amended counter-claim. Granted as to Counts 1, 3 and 4. Denied as to Count 2. Plaintiff moves for a directed verdict to strike certain testimony-denied. Defendant moves for directed verdict as to Brunswick-Reserved. Defendant moves for directed verdict as to Sherwood.-Reserved. Defendant moves to strike all evidence of damages of $100,000.00-Denied.8	
Apr. 20	TRIAL CONTINUED. The Court rules on defendants request to charge, No. 21-Refused. Plaintiff's proposed general instruction No. 4-Refused. Plaintiff proposed special interrogatory No. 5-Refused. Plaintiff's proposed instruction in re: North American Instrument Corporation incident-Refused	
Apr. 21	TRIAL CONTINUED. Judge Foley charged the Jury	
Apr. 22	TRIAL CONTINUED.	
Apr. 22	Filed Court Exhibit #1 - Jury Note	
" "	" " " #2 - Jury Note	
Apr. 23	TRIAL CONTINUED.	
Apr. 19	Filed Supplementary Memorandum in support of Defendant-Counterclaimant's Motion for Directed Verdict on Liability and in opposition to Plaintiff-Counter-Defendants Motion for Directed Verdict.	
Apr. 19	Filed Sepcial Interrogatories submitted on behalf of Defendants and Counterclaimants'.	
Apr. 20	Filed Defendants Proposed Instruction #23.	
Apr. 20	Filed Defendants Supplemental Interrogatory.	
Apr. 20	Filed Defendants Proposed Instruction #24.	
Apr. 20	Filed Defendants Proposed Instruction #25.	
Apr. 20	Filed Defendants Proposed Instruction #22.	
Apr. 21	Filed Defendants Proposed Instruction #21	
Apr. 21	Filed Plaintiffs Proposed General Instruction #4.	
Apr. 21	Filed Defendants Proposed Special Interrogatory #5.	
Apr. 21	Filed Plaintiffs Proposed Instruction in re North American Instrument Corporation Incident.	
Apr. 26	Filed Court Exhibit #3.	
Apr. 26	Filed Court Exhibit #4.	
Apr. 26	Filed Court Exhibit #5.	
Apr. 26	Filed Incomplete Interrogatories - Special Verdict.	
Apr. 26	TRIAL CONTINUED. The Jury is unable to agree upon a verdict in this case. A mistrial is declared. The Jury is excused.	

72-CV-522

DATE 1976	PROCEEDINGS	D Ju
July 23	Filed Letter from Plaintiff's Attorney's to Judge Foley dated July 8, 1	
July 23	Filed Letter from Plaintiff's Attorney's to Judge Foley dated June 11,	
July 23	Filed Letter from Defendant's Attorney's to Judge Foley dated June 24,	
July 23	Filed Letter from Defendant's Attorney's to Judge Foley dated June 21	
July 23	Filed Defendant's Amended Answer & Amended Counterclaim, Jury Demand & Certificate of Service	
July 22	Filed Memorandum-Decision of Judge Foley (7/22/76)	
July 22	Filed Order of Judge Foley(7/22/76) directing to enter a final judgmen the defendant's counterclaimants on Counts I,III and IV of the Counte	
July 22	Filed Judgment and mailed cards, re: Judgment to Mayer, Brown, & Platt and Hogan and Hartson, Esqs.	
Aug. 11	Filed transcript of proceedings held April 19, 1976 at Albany, before Judge Foley	
Aug. 17	Filed Notice of Appeal by defendants	
Sept. 1	Filed Bond on Appeal	
Oct 4	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.	
Oct. 21 1977	Filed reciept for papers sent to C.C.A.	
Jan 19	Sent Supplemental Record on Appeal to CCA, 2nd Cir.	
Jan. 28	Filed receipt for papers sent to C.C.A. (Supplemental Index)	
Sept. 26	Filed transcript of proceedings held March 29, 1976 at Albany before Judge Foley (Volumes I, II, & III)	
Sept. 26	Filed Transcript of proceedings held April 13, 1976 at Albany before Judge Foley	
Sept. 26	Filed Transcript of proceedings held April 14, 1976 at Albany before Judge Foley	
Sept. 26	Filed Transcript of proceedings held April 15, 1976 at Albany before Judge Foley	
Sept. 26	Filed Transcript of proceedings held April 16, 1976 at Albany before Judge Foley	
Sept. 26	Filed Transcript of proceedings held April 23, 1976 at Albany before Judge Foley	

Count III

(For Damages and Injunctive Relief for Tortious Interference with Existing and Prospective Business Relationships)

21. In support of their claims for damages and injunctive relief for tortious interference with existing and prospective business relationships, defendants reallege and incorporate herein by reference paragraphs 1 through 13 and 17 through 20 of this counterclaim.

22. In addition to interfering with defendants' business relationship with AHSC as alleged above, the plaintiffs wrongfully interfered with the defendants' existing and prospective business relationships with other parties. Specifically, the plaintiffs have interfered with the relationships between the defendants and their distributors by threatening to sue the defendants and to involve the distributors in the litigation and by advising prospective purchasers of the defendants' catheters and tubing that the defendants had infringed the plaintiffs' patents, or had breached an agreement with the plaintiffs, or would be unable to continue to supply catheters and tubing because of a proposed suit by the plaintiffs.

23. These wrongful actions by the plaintiffs were undertaken with knowledge of the defendants' existing and prospective business relationships, for the purpose of disrupting those relationships and without privilege or justification. As a proximate result of these actions, the defendants' business relationships have been disrupted, and the defendants have thereby sustained damages totaling approximately $5,000,000. Moreover, unless the plaintiffs are enjoined from continuing their wrongful actions, the defendants will sustain further damage for which they have no adequate remedy at law.

Count IV

(Damages and Injunctive Relief for Unfair Competition)

24. In support of their claims for damages and injunctive relief for unfair competition, the defendants reallege and incorporate herein by reference paragraphs 1 through 13, 17 through 20 and 22.

25. The wrongful acts alleged above were undertaken by the plaintiffs for the purpose of destroying the defendants' business and of thereby preventing the defendants from competing with the plaintiffs. As a proximate result of these actions, the defendants' sales of all types of catheters and tubing have been improperly curtailed and the defendants have been delayed in or precluded from developing products, entering markets and expanding their business. These wrongful actions have caused defendants to sustain damages totalling approximately $5,000,000 and, unless the defendants are enjoined from continuing these actions, defendants will sustain further damage for which they have no adequate remedy at law.

WHEREFORE, defendants respectfully request that this Court enter a judgment:

A. Declaring that paragraph 5 of the settlement agreement dated May 28, 1971, as construed by the plaintiffs, is void and unenforceable.

B. Awarding the defendants, and each of them, treble the amount of damages sustained by them as a result of the plaintiffs' violation of the federal antitrust laws, plus costs, reasonable attorneys' fees and interest.

C. Awarding the defendants an amount, plus interest thereon

equal to the damages sustained by the defendants as a proximate result of plaintiffs' tortious interference with contract and with defendants' existing and prospective business relationships and as a result of plaintiffs' unfair competition.

D. Enjoining the plaintiffs from engaging in any further attempts to interfere with the defendants' business through violations of the federal antitrust laws or by threatening to involve the defendants' customers and prospective customers in litigation, by improperly accusing the defendants of breaches of contract and patent infringements or by continuing any of the other wrongful actions and practices set forth in the counterclaim.

E. Awarding the defendants such other and further relief as this Court may deem appropriate.

Respectfully submitted,

HOGAN & HARTSON

John P. Arness

David J. Hensler

815 Connecticut Avenue
Washington, D. C. 20006
(202) 331-4500

William F. Conway
DeGRAFF, FOY, CONWAY & HOLT-HARRIS
90 State Street
Albany, New York 12207

Attorneys for Defendants and
Counterclaimants

JURY DEMAND

Defendants demand a trial by jury on all issues raised by the amended complaint and amended counterclaim.

HOGAN & HARTSON

John P. Arness

David J. Hensler

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331-4500

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90 State Street
Albany, New York 12207

Attorneys for Defendants and
Counterclaimants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORPORATION, and SHERWOOD MEDICAL INDUSTRIES, INC.,	)	
Plaintiffs,	)	
v.	)	No. 72 CV 522
DAVID S. SHERIDAN, and NATIONAL CATHETER CORPORATION,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' AMENDED COUNTERCLAIM

For their reply to defendants' amended counterclaim, plaintiffs state and allege as follows:

COUNT I

First Defense

1. Plaintiffs admit that defendants purport to state a claim under the statutes designated in paragraph 1 of the amended counterclaim and that the Court has jurisdiction over the counterclaim.

2. Plaintiffs admit the allegations of paragraphs 2, 3, 4 and 5 of the amended counterclaim.

3. Plaintiffs admit that each of the plaintiffs and defendants have engaged in interstate commerce, but plaintiffs deny the remaining allegations of paragraph 6 of the amended counterclaim.

4. Plaintiffs admit the allegations of paragraph 7 of the amended counterclaim, except that they deny the allegations of the last sentence of such paragraph and allege further that paragraph 5 of the May 28, 1971 settlement agreement was included by mutual agreement of both parties.

5. Plaintiffs deny the allegations of paragraphs 8 and 9 of the amended counterclaim.

6. Plaintiffs admit that they have instituted the instant action against defendants to enforce the terms of the May 28, 1971 agreement, but deny each and every other allegation of paragraph 10 of the amended counterclaim and allege further that plaintiffs do not seek to prohibit defendants from competing generally with plaintiffs in the manufacture and sale of conductive tubing, but only such tubing as is covered by paragraph 5 of the said agreement.

7. Plaintiffs deny the allegations of paragraph 11 through 15 of the amended counterclaim.

Second Defense

Count I of the amended counterclaim fails to state

a claim for which relief may be granted.

Third Defense

Defendants are estopped to assert a counterclaim which seeks to avoid the obligations undertaken by them in the settlement agreement of May 28, 1971.

Fourth Defense

The amended counterclaim of defendants is barred by the doctrines of accord and satisfaction and collateral estoppel.

Fifth Defense

The amended counterclaim of defendants is barred in whole or in part by the applicable statute of limitations (15 U.S.C. §156).

COUNT II

First Defense

1. Plaintiffs reallege and incorporate herein by reference and answer to paragraphs 1 through 13 of this amended counterclaim.

2. With respect to paragraph 17 of the amended counterclaim, plaintiffs admit that on December 1 and April 18, 1972, respectively, AHSC issued purchase orders

90-0944 and 90-77361 for conductive tubing in an amount totaling approximately $80,000. Plaintiffs are without knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph 17.

3. Plaintiffs deny each and every allegation contained in paragraph 18 of the amended counterclaim, except that they admit that Sherwood's president did telephone, and the write to, AHSC's executive vice president and marketing vice president, calling their attention to the settlement agreement attached to the amended claim as exhibit A.

4. Plaintiffs deny each and every allegation contained in paragraphs 19 and 20 of the amended counterclaim.

Second Defense

Count II of the amended counterclaim fails to state a claim for which relief can be granted.

Third Defense

Defendants are estopped to assert a counterclaim which seeks to avoid the obligations undertaken by them in the settlement agreement of May 28, 1971.

Fourth Defense

Count II of the amended counterclaim is barred by the three-year statute of limitations, CPLR §214(4).

COUNT III

First Defense

1. Plaintiffs reallege and incorporate herein by reference their answer to paragraphs 1 through 13 and 17 through 20 of the amended counterclaim..

2. Plaintiffs deny each and every allegation contained in paragraphs 22 and 23 of the amended counterclaim.

Second Defense

Count III of the amended counterclaim fails to state a claim for which relief can be granted.

Third Defense

Defendants are estopped to assert a counterclaim which seeks to avoid the obligations undertaken by them in the settlement agreement of May 28, 1971.

Fourth Defense

Count III of the amended counterclaim is barred by the doctrines of accord and satisfaction and collateral estoppel.

Fifth Defense

Count III of the amended counterclaim is barred by the three-year statute of limitations, CPLR §214(4).

COUNT IV

First Defense

1. Plaintiffs reallege and incorporate herein by reference paragraph 1 through 13, 17 through 20, and 22.

2. Plaintiffs deny each and every allegation contained in paragraph 25 of the amended counterclaim.

Second Defense

Count IV of the amended counterclaim fails to set a claim for which relief can be granted.

Third Defense

Defendants are estopped to assert a counterclaim which seeks to avoid the obligations undertaken by them in the settlement agreement of May 28, 1971.

Fourth Defense

Count IV of the amended counterclaim is barred by the three-year statute of limitations, CPLR §214(4).

WHEREFORE, plaintiffs pray that this Court dismiss the amended counterclaim and assess costs against defendants.

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
ST 2-0600

By _____
Watson B. Tucker

AINSWORTH, SULLIVAN, TRACY & KNAUF
State Bank Building
75 State Street
Albany, New York 12207
434-4171

Attorneys For Plaintiffs

Transcript of March 29, 1976
Opening Statement of Attorney for
Plaintiffs Brunswick Corporation
and Sherwood Medical Industries, Inc.
(p.8 l.21--p.9 l.4)

As you know, there are two corporate plaintiffs in this case. One plaintiff is Sherwood Medical Industries. The business of Sherwood Medical Industries is the manufacture and sale of medical products for surgical and medical uses. Sherwood has a plant in North Argyle, New York, and at that plant Sherwood manufactures tubes and catheters for medical purposes. That is not the only plant which Sherwood has, but it is the only plant that is involved in this lawsuit.

***

(p.10 l.17 -- p.11 l.2)

Mr. Sheridan has, for many years, well back into the 1950's, been one of the industry's leading inventors and innovators in connection with the manufacture of plastic tubing for surgical purposes. The facts that you will be called upon to deliberate in this case really begin in about 1960, approximately 16 years ago. At that time, Mr. Sheridan had a company called Sheridan Catheter and Instrument Company. That company was also located in North Argyle, New York, and the business of that company was the manufacture and sale of plastic tubes and catheters for medical purposes. Brunswick

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(p.20 l.17 -- p.20 l.21)

When Mr. Sheridan came on the scene, he devised a new type of conductive tubing. This tubing was, first of all, clear plastic. Secondly, it had, running along its length, a black strip of electrically conductive material. This type of tubing was the

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(P.27 l.9 -- p.30 l.9)

What do the defendants say by way of defense? There are two defenses, essentially, interposed. The first defense, ladies and gentlemen, is that the tubing which Mr. Sheridan and National Catheter Corporation now sell is not similar in features or configuration, does not constitute tubing similar to the products being made by Sherwood. In short, the defendants say that the two pieces of tube are not similar. That, ladies and gentlemen, is the first great question this jury will have to decide. You will see this tubing. You will have the opportunity to inspect it. You will have the benefit of testimony from both sides. One of the questions you must decide is whether in fact the two types of tubing are similar.

The second point urged in defense is that the restriction imposed on Mr. Sheridan by the settlement agreement of May 1971 is in fact an unreasonable

restriction, and therefore should not be enforced by this Court.

Let me, if I may, direct my comments to the first of the two defenses. That is, the defense that the two types of tubing are not similar. The contract contains the word "similar," and it doesn't define for us what similar means, as you will see when we place that exhibit before you. You therefore will have to devise a definition of similar which comports with your own reasoning and experience and which comports with the evidence presented to you. One would think that Webster's dictionary and a physical inspection of this tubing would be all that would be needed in order to determine that these two products are in fact similar. But there are, admittedly, two differences.

The difference, number one, Mr. Sheridan's tubing which has a conductive line, and bear in mind that it is that conductive line which is essential in suction, lays, the conductive line, on the outside wall of the tubing. The conductive line is not forged into the wall of the tubing. Difference number two, as you will see when we get to the actual evidence, is that the so-called connectors on each end of Mr. Sheridan's tubing are different, so that the means by which one

would connect the tubing either to another length of tubing or to a vacuum bottle or suction machine is different.

We leave it to you, ladies and gentlemen, to decide whether those two admitted differences are such as to make Mr. Sheridan's tubing not similar to the tubing made by Sherwood.

With respect to the connectors, there are indeed different types of connectors, but this is not a lawsuit about connectors. I submit it is a lawsuit about tubing and I submit that when you see the tubing itself, when you see the relationship that those connectors have to those tubings, that you will agree that the fact that one changes connectors on either end of the tube does not affect the question of whether Mr. Sheridan's product has features or configuration of a conductive line similar to plaintiffs' product which has the same features and configurations and the same line.

Second, with respect to the argument that Mr. Sheridan's tubing has a black line which runs along the outside of it and the Sherwood tubing has a black line which is forged into the wall, I submit that the testimony will show to you, ladies and gentlemen, that this is a difference absolutely lacking

either significance or reason. Mr. Trembly, who will testify as to the extrusion techniques, will show you just how easy it is to get from the Sherwood tube on one hand to the National Catheter tube on the other hand. And the witnesses I have already identified, Mr. Katz, Mrs. Rogers, will tell you just what difference this minute change in placement of line makes. And I respectfully submit that the answer will be, it makes no difference at all.

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Testimony of John N. Willman
(p.60 l.17 -- p.61 l.13)

Subsequent to my service years, I think I was separated in 1946, I went back to American Hospital Supply Corporation in an executive capacity. I continued with American Supply Corporation until 1959 in various executive positions. When I was last with them I was their vice-president of operations located in the headquarters in Evanston, Illinois. I left them to join the Brunswick Corporation coincidental with their acquisition of A. S. Allo Company of St. Louis, who at the time was the second largest hospital supply company in the country.

I went down there and subsequently became the head of it for them. They, at that time, referred to it as their health and science division. We acquired

a number of companies, including Mr. Sheridan's company, Sheridan Catheter and Instrument Corporation, to create what has now become known as Sherwood Medical Industries, which is an 85-percent owned subsidiary of Brunswick Corporation and has trade on the American Stock Exchange. I was the president there and chief operating officer. In fact, I put the company together for them and then took it public to the extent that it is now public 15 years.

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(p.66 l.6 -- p.79 l.13)

Q Directing your attention to the 1940's and 1950's, what kind of tubing was used for suctioning in the operating room?

A Generally, heavy-walled rubber tubing, usually reinforced rubber tubing or either natural or synthetic rubber tubing that was opaque, that you couldn't see through.

MR. TUCKER: If the Court please, I would ask the clerk to mark as Plaintiff's Exhibit 1 for identification a four- or five-foot length of black tubing.

THE CLERK: Plaintiff's Exhibit 1 for identification.

Q Mr. Willman, would you take a look at Plaintiff's 1 for identification and state whether that exhibit is an example of the kind of tubing which was used for suctioning in the 1940's and 1950's, the time which you just described?

A Well, it certainly would serve the purpose as it was known then very admirably.

MR. TUCKER: Your Honor, I will offer

Plaintiff's Exhibit 1 for identification into evidence, tendering it to counsel.

MR. ARNESS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit No. 1 for identification received in evidence.)

BY MR. TUCKER:

Q Were any other types of tubing employed for suctioning in the 1940's and 1950's, Mr. Willman, besides tubing such as Plaintiff's Exhibit 1?

A In the broad sense, no. There were fabric-reinforced walls to make it more rigid, and that sort of thing, but they were all opaque, or at best translucent.

Q Was clear tubing used for suctioning?

A If it was, I never came across it.

Q Would there have been any advantage, Mr. Willman, in the suctioning procedure to use tubing that you could see through instead of tubing that was opaque?

A Oh, certainly.

Q What were they?

A Well, for one thing, it would give the people in the operating room substantial evidence of the fact that the tube wasn't clouded or obstructed, and that the flow of the material was actually progressing through the tube. Also, it is in some forms of suction where the tube is

actually through a natural orifice or passage in the patient's body, the nature of the fluid could be observed coming through clear, transparent tubing, which is quite important to the physicians and nurses in many instances.

Q Was there, in the 1940's and 1950's, tubing available which was clear and yet at the same time was conductive?

A Not to my knowledge. In fact, I am quite certain there was not.

Q Do you know why, Mr. Willman, it was necessary for the tubing to be conductive? Just speak in general terms.

A Well, certainly in an operating room environment where they are giving inhalation type anesthetic, they often use explosive gases or sometimes use explosive gases, and I think a couple were mentioned this morning. One of them was cyclopropane. Now, these are gases that are heavier than air, and the excess of them that may not be inhaled by the patient, and the exhalation, for that matter, tends to sink to the floor of the room because it is heavier than air, and being explosive, they can conceivably, and of course in fact ignite by the sparks. It has caused fires and caused explosions that have grievously injured patients and operating room personnel, in fact, have killed them from time to time. This is a well-documented fact.

Q Have you ever met Mr. David Sheridan?

A Yes, indeed.
Q When was the first time you met Mr. Sheridan?
A Well, if memory serves me correctly, I think I met Dave Sheridan for the first time in the late summer or the early fall of 1959. It was subsequent to my purchase of the T. J. Noonan Company.
Q Would you describe the circumstances of your first meeting with Mr. Sheridan?
A Yes. There was a salesman for the T. J. Noonan Company which I had purchased for Brunswick at that time named Bill Peter who lived, at least at that time, in Glens Falls. And I had had some idea of Mr. Sheridan's capabilities and was interested in meeting him, and Bill Peter made it known to me that he knew Mr. Sheridan and he arranged for me to meet Mr. Sheridan, in fact, took me to his farm in North Argyle for that purpose.
Q And did a meeting there take place between yourself and Mr. Sheridan?
A Yes, it did.
Q Who was present besides yourself and Mr. Sheridan?
A Well, to the best of my recollection, in addition to Mr. Sheridan and myself, I think Bill Peter was undoubtedly present at that first meeting.
Q As of the timeof that first meeting, Mr. Willman, was there on the market any clear tubing for use in suctioning

which had a black line running down its length?

A To the best of my knowledge, no.

Q Mr. Willman, would you please state what took place at that first meeting between yourself and Mr. Sheridan?

A Yes. I was, of course, prepared for what I saw in the name, but Mr. Sheridan had a briefcase that he referred to quite properly as his bag of tricks. We met in his living room, in his farm, and he showed me, really, three things that interested me keenly. One was, he showed me that he could -- and explained to me that he could, as he extruded a tube, independently vary the inside diameter, the outside diameter and the wall thickness of the tube which allowed him to create a bulge within the reasonable tolerance of dimensions that he pre-determined as he extruded the tube. That was one of the things that fascinated me.

Another thing he could do is that he could extrude a line continuously in a tube. At that time, if memory serves me right, the purpose that he felt this was most applicable for was because it could be made of a material that was radio opaque, or in other words, opaque to X-ray. And this interested me very much. And finally, of the three things that I recall very clearly that I was fascinated by was that he had a tube, a plastic tube in which he extruded a hole the length of

the wall of the tube, and a distance down the tube he had fastened it to a flexible plastic balloon. And there is a type of catheter known as a Foley catheter or balloon catheter made of latex, where if it could be successfully made entirely of plastic, would have decided advantages. This was the third thing that he showed me that created great interest on my part.

Q Did Mr. Sheridan show you an example of tubing with a conductive line running along its length?

A Well, I don't really recall that the thrust of the conversation was conductivity at the time. The line that he showed me, as I recall, and to the best of my knowledge, the thrust there was that it could be made radio opaque. Subsequently, of course, the same technique that made the radio opaque line could have been and did produce a conductive line, an electrically conductive line.

Q Would you explain to the jury what the function of tubing with a radio opaque line extruded within it would be?

A Well, again, since all of these tubes are designed to take something out of or put something into the human body, the tube often, or almost always, goes into the body in a manner that makes it impossible to see it visually after you put it inside the patient.

For instance, a stomach tube that should normally, would be inserted through the nose and down the

back of the throat and into the stomach of the patient, once it gets past the end of the patient's nose, the operator can't see it any more. If it has a radio opaque line in it or some radio opaque substance in it, then if you fluoroscope it or take a picture of it by X-ray, you can visualize on the X-ray film exactly the position of the tube in the patient's body. This is the value of and the importance of the radio opaque line.

Q What if anything did Mr. Sheridan say about the relationship between conductive line tubing and a radio opaque tube?

A Well, I don't recall that detail of the conversation at that time at all, don't even recall that such a conversation was or was not -- or such and such a commentary was a part of the conversation. I just don't recall such conversation.

Q What happened next after the series of meetings that you described for us?

A Well, on behalf of Brunswick Corporation, I negotiated with Mr. Sheridan, and ultimately we bought his company.

Q During the period of these negotiations, did Mr. Sheridan show you a sample of any tubing with a conductive line running along its length?

A I have no recollection of it.

Q When did you first see a sample of such tubing?

A I really couldn't tell you that, either; just don't recall.

Q Was it before or after the acquisition by Brunswick?

A I can only answer that in a speculative fashion, but my judgment would be that it was before the acquisition that this application was discussed, because it was an obvious, apparent possibility.

Q And in connection with the purchase of Mr. Sheridan's company, was a stock purchase agreement executed between Mr. Sheridan and your company, Brunswick?

A If I understand the phrase correctly, stock purchase agreement, we did agree to purchase his stock with Brunswick stock. It was a stock-for-stock exchange, if my memory serves me right, based on a minimum equity value of the company plus a premium.

Q Do you recall any of the details of that minimum plus premium?

A Well, it seems to me, again, to the best of my recollection, that Mr. Sheridan's company had a net worth of about $100,000, more or less. I think if memory serves me right, we agreed to pay him for the company an amount approximating double that, or about $200,000. But more important, far more important than that was, we agreed to a royalty arrangement that he proposed, and that was that we pay him four percent on the first $500,000 worth

of volume each year, three percent on the second $500,000 worth of annual sales volume and two percent thereafter.

To the best of my knowledge, those are the royalties he enjoys from Sherwood, to the present day.

MR. TUCKER: If the Court please, I would like marked as Plaintiff's Exhibit 2 for identification a copy of an agreement purportedly executed by John Willman and Brunswick on the one hand and David S. Sheridan on the other hand.

THE CLERK: Plaintiff's Exhibit 2 for identification.

MR. TUCKER: I will show you the document, Mr. Arness.

MR. ARNESS: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit No. 2 for identification received in evidence.)

THE CLERK: That agreement is dated February 18, 1960, your Honor.

MR. TUCKER: If it please the Court, I will mark as Plaintiff's Exhibit 3 for identification a copy of an agreement dated March 10, 1960, between David S. Sheridan on the one hand and Brunswick on the other hand.

I tender the document to counsel and offer it in evidence at the same time.

MR. ARNESS: No objection, your Honor.

THE COURT: All right, received.

(Plaintiff's Exhibit No. 3 for identification received in evidence.)

BY MR. TUCKER:

Q Mr. Willman, would you refer to what we have marked as Plaintiff's Exhibit 3 in evidence and state whether that is the agreement to which you just made reference?

A Yes, sir, this is a copy of that agreement.

Q Do you recall, Mr. Willman, whether at the time you had these meetings and conversation with Mr. Sheridan leading up to the execution of the agreements, Exhibits 2 and 3, in February and March 1960, do you recall whether if at that time Mr. Sheridan had advised you that he had applied for a patent in connection with clear conductive tubing?

A No, to the best of my recollection, I don't recall that he said he had.

MR. TUCKER: I would like to mark as Plaintiff's Exhibit 4 for identification a length of tubing approximately six feet in length which bears the catalog number, "Argyle 2930."

THE CLERK: Plaintiff's Exhibit 4 for identification.

Q Would you look at Plaintiff's Exhibit 4 for identification, Mr. Willman, and tell the jury what that is, please.

A Well, this is clear tubing with a conductive line, manufactured by Sherwood Medical Industries, under the patent license that Sherwood Medical Industries, or Brunswick purchased from Mr. Sheridan.

Q And to your knowledge, is that an example of tubing developed by Mr. Sheridan at about the time of the negotiations for his business that you spoke of?

A Yes, it is. I think it is also the bubble that I referred to.

Q Are you referring, Mr. Willman, to the fact that on one end of the tube it appears to bubble out?

A Bubble, yes. That is by intent.

Q And is that the bubble that you were referring to when you stated --

A Yes, it is.

Q And would you demonstrate to the jury, by use of that bubble, Mr. Willman, what advantage, if any, that tube has and also show his Honor.

A Well, by cutting the tube in half, for example, you can create a funnel, that is what has been done in this end, leaving it the way it was extruded, and then cutting it where it slopes off, you create what we call and Dave called an integral male connector. And then that means

as though these were two separate pieces of tubing. Bearing in mind, these tubes always must be connected to something, you connect them by going like this and you get a connection, which was the thing, as I said at the onset, that I found particularly fascinating by Mr. Sheridan's capabilities when I first met him at his house in North Argyle.

MR. TUCKER: If the Court please, I will tender to counsel, Plaintiff's Exhibit 4 for identification and offer it into evidence.

MR. ARNESS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit No. 4 was received into evidence.)

BY MR. TUCKER:

Q Mr. Willman, when was the first time that clear conductive tubing similar to Plaintiff's Exhibit 4 became available in the hospital supply industry for marketing to hospitals?

A Well, I am not exactly certain as to when it might have been, but we completed the negotiations to purchase Sheridan Catheter and Instrument Corporation in February, late February or early March 1960. We then gave him the specifications around which we wanted to design a line of catheters and tubes, using his methods, that we broke

into the market, which we entered the market with that tube line in approximately July 1, 1960. So I would say that that tubing appeared on the market subsequent to that date.

Now, whether it was immediately coincident with the other tubes or some weeks or months later, I just don't recall. But it would have been subsequent, I believe, to July 1, 1960.

Q Was there anything like Exhibit 4 on the market for suction prior to the time that you made that introduction, sir?

A No, there was not.

Q Is it fair to state that the typical suction device is exemplified by Plaintiff's Exhibit 1?

A That would certainly be similar to a lot of them.

MR. TUCKER: If the Court will permit me at this time, I would like to pass around to the jury Plaintiff's Exhibit 1 in evidence which is the solid opaque suction tubing, and Plaintiff's Exhibit 4 in evidence which is the clear tubing with the black line

THE COURT: All right. So, ladies and gentlemen, pass it around, if you want, and take a look at the exhibits.

MR. TUCKER: I wonder, your Honor, while the jury is looking at the samples, Exhibit 1 and 4,

if I might ask Mr. Willman a question.

THE COURT: Sure.

BY MR. TUCKER:

Q Mr. Willman, with reference to Exhibit 4, is part of that tubing electrically conductive?

A Oh, yes, indeed.

Q What part of it is?

A The black line.

Q And is part of that tubing not conductive?

A Yes.

Q What part?

A The transparent part, or in other words, the balance of the tube, other than the black line.

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(p.79 l.21 -- p.80 l.20)

Q During the course of your negotiations with Mr. Sheridan, Mr. Willman, did you have conversations with Mr. Sheridan about the extent to which patent protection would be available in connection with his extrusion process?

A Well, yes, during our conversations, he had these several documents which I accepted as unique, and we later concluded on the basis of investigation, were unique, all of which were potential, potentially protectable by patent, yes, we had this discussion.

Q And to what extent, if any, did Mr. Sheridan ever indicate that patent protection would supplant know-how in connection with the manufacture of such tubing?

A Well, I recall a specific conversation with Mr. Sheridan in this regard that was specifically related to the bubble process, or this process of being able to independently control the inside and outside diameters and wall thickness of the tube as he extruded it, and there was some concern expressed, I don't recall by whom, that when the patent was allowed to issue, this might permit people to design around it because they would see exactly how this unique process was accomplished. And Mr. Sheridan's response to me was that he didn't think they would get too far in their attempts because know how related to the process was essential to its successful practice.

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(p.82 l.10 -- p. 82 l.19)

Q Mr. Willman, let me show you next a copy of a document which I will first mark as Plaintiff's Exhibit 6 for identification, being a January 26, 1960 memorandum from J. N. Willman to H. F. Bair.

THE CLERK: Plaintiff's Exhibit 6 for identification.

Q Mr. Willman, is Plaintiff's Exhibit 6 for identification a copy of a memorandum prepared by you on or about the date that it bears?

A Yes, sir.

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(p.86 l.1 -- p.90 l.13)

BY MR. TUCKER:

Q Mr. Willman, referring to what has been received in evidence as Plaintiff's Exhibit 6, that is, the January 26, 1960 memorandum by Mr. Willman, would you first state who Mr. H. F. Bair was in 1960?

A H. F. Bair was the president of the Allo Company at the time Brunswick bought the company. He continued thereafter until I succeeded him in January of 1961 as the corporate vice-president of Brunswick Corporation and president of the Allo Division of Brunswick. At that time he was my superior.

Q And does Exhibit 6, Mr. Willman, contain a paragraph which makes reference to what you, as the negotiating officer, sought to achieve in connection with know-how and Mr. Sheridan?

A It certainly does.

Q Would you read to the jury that paragraph?

A Certainly. "Should we elect to terminate Sheridan's employment on the occasion of any one of the intervals that we are permitted this right, we will retain exclusive license for the use of his patents, but he will have the right to go into the catheter business if he cares to do so, in competition with us and use his trade secrets and know-how. If, on the other hand, Sheridan elects to terminate his employment, he will not

be permitted to use any of his trade secrets or know-how to compete with us."

This is the paragraph in question.

Q What trade secrets and know-how were you referring to when you wrote that paragraph to your superior, Mr. Bair?

A Well, I was referring to those things that are connected with, again, basically, the three things that I found of greatest interest in his capabilities. That is, the ability to extrude this bubble and the ability to extrude these lines, the one conductive and the other radio opaque in a continuous manner in a tube.

Q And did the employment contract entered into between Mr. Sheridan on the one hand and Brunswick on the other in 1960 carry forward that intent to protect know-how?

A Certainly did.

MR. ARNESS: Your Honor, I object. The documents speak for themselves. Whether they did or not is a matter of whether the documents carry out the contention.

MR. TUCKER: To obviate the objection, your Honor, I was going to have Mr. Willman read the relevant language from the contract.

THE COURT: All right. You should read the part. Are you going to have it read, the part that explains it?

MR. TUCKER: Yes, sir.

Q Now, referring you to Exhibit 5, Mr. Willman, does that exhibit carry forward the intent which you have just described to the jury?

A Yes, if that is the employment agreement, it does.

Q And would you read the paragraph of Exhibit 5, letting the record show I have pointed to paragraph 7, read the paragraph of Exhibit 5 which carries that through.

A "During his employment by Catheter or Brunswick, Sheridan agrees that he will not engage in any activities, directly or through any other corporation or organization competing with the business of Catheter or Brunswick. This restriction shall be binding upon Sheridan for a term of five years after February 19th, 1974, if the agreement is not terminated by Catheter or Brunswick prior thereto."

Q When you purchased National Catheter Corporation, Mr. Willman, in early 1960, would you please tell the jury what it was that you purchased, in your own words?

A Well, it is sort of repetitious, but I purchased, on behalf of Brunswick, Mr. Sheridan's capability to, again, independently vary the inside and outside diameter of the tube and the wall thickness as he extruded it, and his ability to extrude in a continuous way these lines of dissimilar material in the wall of a plastic tube.

Mr. Sheridan, while he had a business, it was inconsequential. I think he was doing something in the neighborhood of 100 to $125,000 worth of business the time on an annual basis. So, while we indeed did purchase his business, it was essentially these capabilities that we purchased. The fact, the intriguing fact to me was, up to that time, the people he was doing business with apparently took very little interest in these capabilities which fascinated me.

Q By these capabilities, referring to the bubble and the line?

A The bubble and the lines, yes.

Q Was there any machinery purchased in connection with the purchase?

A Oh, yes, Mr. Sheridan had some extruding equipment. I don't recall just how many extruders he had, and some various types of dyes through which he extruded materials, some dyes also that he [illegible]shed tips [illegible]it that he made eyes in catheters, and some [illegible] he put the end of the tubes in a dye to form the [illegible] the tube and things of that nature, the necessary equipment to make plastic catheters and tubing.

Q Was such equipment commercially available elsewhere?

A As far as the extruders were concerned, yes. In fact, I don't recall specifically the origin of his extruders

that we bought at the time, but there is a company here in this country called Sterling over in New Jersey that makes extruders, and I think we subsequently bought from them. I believe we also bought some extruders for Mr. Sheridan from time to time and dyes, and that sort of thing. With dyes, he preferred the plastic to form the items. I think for all practical purposes, without exception, those were made right in his own shop at the plant, in his own tool room.

Q Now, what did the plant look like?

A Well, it was a converted rural cow barn. I imagine it was originally a cow barn. It was a typical red sort of New England type farm barn.

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(p.93 l.24 -- p.94 l.18)

Q Mr. Willman, after Sherwood commenced to market clear conductive tubing such as Plaintiff's Exhibit 4, for what purpose did it market that tubing?

A Well, it marketed that tubing for use in the hazardous areas. And by that I mean for use in areas where explosive gases were being used in a hospital environment.

Q And what part of the hospital would that apply to?

A Well, that was normally the operating suite, but it could have been, in some instances, the obstetrical suite, it could have been in the emergency room, it could have been a number of things. But characteristically, it was for use in the operating room.

Q And for what purpose within the operating room was that marketed?

A It was marketed for use as suction tubing in such an environment, primarily, and the conductive feature was designed to provide safety to the operators and the patients that a spark wouldn't be generated as a result of static built up on the tube that might cause the explosive gases or explosive atmosphere to be ignited.

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(p.95 l.7 -- p.95 l.25)

When we ultimately built the factory, we exercised our option that we retained from him, bought the ten acres of land and constructed a first-rate factory there.

I think the initial factory was 10,000 square feet. It was, of course, a brick and concrete structure designed for the purpose that subsequently has been expanded a number of times. I don't know its exact size, but I would guess it is approximately 8,000 square feet, or some such, at the present time. It is quite a large factory there now.

Q Did that factory provide employment for people in the area?

A Oh, unless things have changed since I left Sherwood, it was, by a wide, wide margin, the largest employer in that part of the country, and I would say that it provided, payrollwise, the economic backbone of the community.

Q How far from the red barn was the factory built?

A Right across the road.

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(p.100 l.13 -- p.101 l.23)

Q And on these occasions when Mr. Sheridan asked you to fire him, Mr. Willman, were you aware of the language of the contract, the employment agreement, Exhibit 5, which starts at the top of page 4, pertaining to the binding effect of the restriction on Mr. Sheridan?

A Yes, I was, very definitely.

Q What did that language say?

A Well, that language says this restriction shall be binding upon Sheridan for a term of five years after February 19th, 1974, if the agreement is not terminated by Catheter or Brunswick prior thereto.

Q And if you had fired Mr. Sheridan as he requested, would that have been a termination of Catheter by Brunswick?

A It would have, indeed.

Q Did a dispute thereafter arise between Mr. Sheridan on the one hand and Brunswick on the other hand, Mr. Willman? By thereafter, I mean after Mr. Sheridan left Brunswick in October 1967.

A Oh, yes.

Q And what were the circumstances surrounding that dispute, if you recall?

A Well, to the best of my recollection, it had its origins in the fact that Mr. Sheridan, in my opinion, took the position that I had fired him, whereas I took the position that he had walked off his job. We continued him on the payroll, but again, these things, to the best

of my recollection, because we had not dismissed him for some time, sending him his checks. I do not recall the disposition of these payroll checks, but it seems to me that at one point in time we received a communication that the retention of a check or checks was being viewed by him as compensation for the plant's use of this land of his for a parking lot. But this whole situation got a little bit ridiculous again, in my opinion, as time moved along because of what, in my opinion, was the fiction of his dismissal.

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Transcript of March 30, 1976
Testimony of John N. Willman
(continued)
(p.112 l.12 -- p.116 l.21)

Q Mr. Willman, directing your attention to the conclusion of yesterday's testimony, you stated, I believe, that after Mr. Sheridan left, a suit was instituted by Brunswick against Mr. Sheridan. Is that generally correct?

A That's correct.

Q And at whose instance was that suit filed, sir?

A On behalf of Brunswick.

Q For what purpose was that suit filed?

A The purpose of that suit was for the courts to put a construction on our rights under our agreement with Mr. Sheridan.

Q To your knowledge, were any money damages requested in that suit?

A Well, my first recollection was that none were requested, but subsequently I realized that this was an error on my part. We asked for $50,000. It is my understanding that this was put into the claim, if you will, for technical, legal, technical reasons, but what we were actually after was for the court to determine or establish what our rights were under the contract, specifically, the employment contract and the license agreement.

Q Do you recall when that suit was filed, sir?

A It must have been filed early in '68.

Q Was the suit actually brought to trial, Mr. Willman?

A No, it never came to trial.

Q What happened, if anything, which prevented it from coming to trial?

A We finally settled it in the spring of '71, if memory serves me right.

MR. TUCKER: At this time I would ask to have marked as Plaintiff's Exhibit 9 for identification, a copy of a document entitled "Settlement Agreement," dated May 28th, 1971.

THE CLERK: Plaintiff's Exhibit 9 marked for identification.

BY MR. TUCKER:

Q Mr. Willman, would you look at Plaintiff's Exhibit 9 for

identification and state for the record what that is, if you recognize it.

A Yes, this is a copy of the settlement agreement, the 28th of May 1971.

Q Is that the same settlement that you referred to a moment ago in your testimony?

A Yes, it is.

MR. TUCKER: If the Court please, at this time I would offer into evidence as Plaintiff's Exhibit 9, Plaintiff's Exhibit 9 for identification. I am tendering it to counsel.

MR. ARNESS: Again, this is a Xerox copy, I assume. We have no objection.

THE COURT: Received.

This is the agreement that really this lawsuit is all about on the Plaintiff's side.

MR. TUCKER: This is the agreement which is attached to the amended complaint in this action as Exhibit A, and this is the document on which the suit is predicated, that is correct, sir.

BY MR. TUCKER:

Q Mr. Willman, at the time this settlement agreement was signed, do you know of National Catheter Corporation was in business in competition with Sherwood?

A Indeed they were.

Q And do you know if Mr. David Sheridan was in business in competition with Sherwood?

A Yes, he was.

Q Between the time that Mr. Sheridan left us in 1967 and the date of this settlement agreement, what if any exchanges took place in New York, Ar[illegible] New York, as far as Catheter's manufacturing facilities were concerned?

A Mr. Sherida[illegible] constructed a factory immediately adjacent to Sherwood's property there.

Q How close to Sherwood's factory is Mr. Sheridan's factory?

A Oh, I wouldn't be able to tell you precisely, but I would say, from a practical standpoint, as close as I am to the lady on the end of the row there.

Q Indicating Mrs. Southworth, juror number one?

A Yes, about that close, as close as it could be.

THE COURT: What is the estimate in feet? Because the record won't show it.

MR. TUCKER: Let the record show that --

THE WITNESS: 50 feet.

BY MR. TUCKER:

Q 50 feet?

A More or less.

MR. TUCKER: Let the record show the distance between the witness and M[illegible] Southworth appears

to be about 30 feet.

THE COURT: I think 50 is generous.

About 30.

Q What products, if you know, were being manufactured at that facility of National Catheter in North Argyle, New York?

A Well, it was my understanding that they were manufacturing the line of -- general line of catheters and tubes that I referred to yesterday that they were selling through the firm that young Noonan had formed with the partner I mentioned whose name I can't recall, and I believe -- I don't know whether at that time they were making suction handles for American Hospital Supply or not, but primarily, as far as I know, the products that were being made there by Mr. Sheridan were moving to market under brand names of other people.

Q How would you characterize the appearance of the new Catheter factory as compared with the appearance of the Sherwood factory?

A Well, the architecture was, I would say, was completely compatible with the architecture of the Sherwood plant.

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(p.125 l.14 -- p.125 l.18)

A Well, the purpose of this language was to protect for Sherwood what we had bought from Mr. Sheridan and what Sherwood continues to pay him for to this very day, to the best of my knowledge, in the form of royalties which are very, very substantial.

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(p.126 l.1 -- p.127 l.23)

Q Mr. Willman, following the execution of the settlement agreement which is Plaintiff's Exhibit 9, did Sherwood or Brunswick dismiss their suit against Mr. Sheridan?

A Yes, they did.

Q To your knowledge, did Mr. Sheridan dismiss his claims against Sherwood and Brunswick?

A Yes, he did.

Q What happened next, if anything, in connection with the relationship between Mr. Sheridan and Sherwood?

A Well, I became aware of the fact that he was making tubing, conductive line tubing in direct violation of his covenant.

MR. TUCKER: Let me ask to have marked as Plaintiff's Exhibit 11 for identification a length of tubing approximately six feet long bearing the catalog number 1023-6.

THE CLERK: Plaintiff's Exhibit 11 marked for identification.

MR. TUCKER: With the Court's permission, without a foundation, I will simply ask counsel to agree to the admissibility of Exhibit 11 for identification into evidence as a sample of the National Catheter clear conductive tubing.

MR. ARNESS: Agreed.

THE COURT: Received.

BY MR. TUCKER:

Q Mr. Willman, would you please refer to Exhibit 11 for identification and state for the record whether that is a copy of the -- or a sample of the tubing to which you just made reference.

A This is it.

Q Do you now understand, and did you understand at the time, that that tubing was the tubing manufactured by National Catheter?

A Yes.

Q Would you state for the record whether, from your point of view as chief executive officer of Sherwood, the tubing which is in evidence as Exhibit 10 is tubing -- I will read the exact language, if I may.

"Is tubing incorporating features or configurations of a conductive line similar to the products manufactured by Sherwood as of February 1969."

Noting for the record that I have just read from Exhibit 9, the settlement agreement.

A Absolutely.

Q For what reason are the two similar, sir?

A They both have a continuous conductive line along their length.

***

(p.129 l.19 -- p.137 l.17)

Q Mr. Willman, when it came to your attention that tubing of which Exhibit 11 is an example, was being sold by National Catheter, what if anything did you do?

A Well, I consulted our counsel to find out whether or not they agreed with me that it was obviously similar

and in violation.

Q Other than consulting with your attorney, counsel, what did you do, sir?

A Well, I also understood that he either was selling this tubing or they were contemplating buying it at American Hospital Supply Corporation, and I called Mr. C. G. Schmit who is a vice president of American Hospital Supply Corporation to tell him that we had a settlement agreement with Mr. Sheridan --

Q Let me stop you before you proceed. Would you state to your best recollection when you called Mr. Schmit?

A I would say it certainly must have been in '71, not terribly long after we executed the settlement agreement. The exact date escapes me, but I think it is in the record.

MR. TUCKER: Let me mark as Plaintiff's Exhibit 12 for identification a copy of an April 27, 1972 letter purportedly from J. N. Willman to Christian G. Schmit, and as Plaintiff's Exhibit 13 for identification a copy of a second April 27th, 1972 letter from J. N. Willman to Christian G. Schmit.

In order to separate these two similar documents in the record, I will note that Exhibit 13 for identification consists of four full paragraphs while Exhibit 12 consists of one full paragraph.

THE CLERK: Plaintiff's Exhibits 12 and 13 marked for identification.

BY MR. TUCKER:

Q Mr. Willman, by reference to Exhibit 12 and 13 for identification, is it possible to refresh your recollection as to when you contacted Mr. Schmit?

A Well, very definitely, from these letters, which I certainly do recall now, was on April 27, 1972, because I see in the letter a follow-up to our telephone conversation.

Q Thank you. You therefore telephoned Mr. Schmit on or about April 27, 1972?

A Yes.

Q What did you say to Mr. Schmit, to the best of your recollection?

A Well, to the best of my recollection I told him that it was my understanding that American was contemplating the purchase or was purchasing a form of conductive tubing from Mr. Sheridan that was in violation of our agreement with him that he would not produce such a tube. And my further recollection is that Mr. Schmit asked me if I would send him a copy of the settlement agreement which has been introduced into evidence here this morning, so that his corporate counsel could examine it. I did that, and one of those two letters that Mr. Tucker just put before me was the covering letter with which I transmitted a copy of the settlement

agreement. The other letter covered the transmittal to him on the same day of a sample of our Sherwood tubing, conductive line tubing, so he could examine the actual product vis-a-vis the product that I was protesting.

Q When you refer to the settlement agreement, Mr. Willman, were you referring to the document accepted in evidence as Plaintiff's Exhibit 9?

A Yes, sir.

Q Is that a copy of what you sent to Mr. Schmit on April 27, 1972?

A Yes, it is.

Q And when you refer to a sample of our tubing, would you state whether or not you were referring to tubing of which Exhibit 4 is an example?

A I was.

Q And did you likewise send Mr. Schmit a sample of that, to the best of your recollection?

A Yes, I did send a sample of that to Mr. Schmit.

Q For how long had you know Mr. Schmit before you made this phone call?

A Oh, for at least 20 years.

Q And during that 20-year period of time --

A Let me correct that. I had known Mr. Schmit by this time, oh, I would say, for over 30 years.

Q What if any relationship had you had with respect to

employment with Mr. Schmit over those 30 years?

A Well, earlier in our career, we were both salesmen for American Hospital Supply Corporation and subsequently moved up the promotional ladder there, both to the position of vice president.

Q Were you and Mr. Schmit social friends, also?

A Yes, indeed.

Q And to what extent had the Schmits and the Willmans entertained one another from time to time in their homes?

A Oh, I would say with extreme frequency.

Q Have you exhausted your recollection as to what you said to Mr. Schmit?

A Well, I simply told him that in my opinion, Mr. Sheridan was violating his agreement with us and that it was going to be necessary for us to defend ourselves against this violation, and that was the end of it beyond Mr. Schmit's request that I send him a copy of the settlement agreement so his counsel could examine it.

Q What if anything did you say to Mr. Schmit about a contract between American Hospital Supply and David Sheridan, or National Catheter?

A Nothing. I had no knowledge of any such contract.

Q What if anything did you say to Mr. Schmit to the effect that if you deal with Dave Sheridan, we will get you in a lawsuit?

A I never made any such statement, even by implication, in my opinion.

Q Did you at that time know that Mr. Sheridan or National Catheter was selling other products to Mr. Schmit?

A It was my impression that they were, but that didn't come up in the conversation. Again, it was my impression that they were manufacturing a line of suction tips or handles for American Hospital Supply Corporation.

Q What if anything did you say to Mr.Schmit with respect to American Hospital Supply's purchase of other products from National Catheter?

A Absolutely nothing.

MR. TUCKER: At this time, your Honor, I would move into evidence as Plaintiff's Exhibit 12, the document previously marked as Exhibit 12 for identification, and as Plaintiff's Exhibit 13, the document previously marked as Plaintiff's Exhibit 13 for identification and tender both documents to counsel.

MR. ARNESS: No objection.

THE COURT: Received in evidence.

MR. TUCKER: And these letters, your Honor, with the Court's permission, I will read both of them to the jury.

THE COURT: All right.

MR. TUCKER: Ladies and gentlemen of the

jury, Exhibit 12 in evidence, which is an April 27th, 1972 letter from Mr. Willman to Mr. Schmit states as follows:

"Dear Dutch, I am sending you herewith a sample of our conductive line tubing so that you will be able to understand our contention that it is similar to the one Sheridan is producing."

Let me read now Exhibit 13 in evidence, also a letter dated April 27, 1972, also beginning, "Dear Dutch: In follow-up to our telephone conversation this morning, I send you herewith a copy of our settlement agreement of 1971 with National Catheter Corporation and David S. Sheridan.

"After your counsel has had a chance to review it, I will appreciate hearing from you. Meanwhile, I thoroughly enjoyed our visit. My best to you. John Willman."

BY MR. TUCKER:

Q Mr. Willman, did you have any conversations with any other American Hospital Supply Corporation representatives on or about April 1972?

A Yes, I spoke to Fredrick Grossman.

Q Did you call Mr. Grossman or did he call you, if you recall.

A I am reasonably certain, to the best of my recollection,

that I called Fred.

Q Who was Fredrick Grossman at the time?

A Well, Fred was, and as far as I know still is, a purchasing agent for American Hospital Supply. He may have a different title than that, but that, in fact, was his position at the time.

Q Have you known Mr.Grossman prior to this telephone conversation?

A Yes, I had.

Q For how long?

A Oh, for many years. He came up under me as a salesman in American Hospital Supply when I was running American's New York operations.

Q When was that, sir?

A I may have to call on Mrs. Willman, who is sitting back there, to tell me --

Q What decade?

A Oh, I first knew Fred Grossman in the early 50's, I guess.

Q Had you likewise been socially connected with Mr. Grossman from time to time?

A Not to any great degree, no. We knew Mrs. Grossman and them socially, but not in any sense in the manner in which we knew the Schmits.

Q What did you say to Mr. Grossman in that telephone conversation?

A Well, I would suspect I told him the same things I Dutch, because that was the sole purpose for my contact with people at American, and I would further suspect, although I can't say it for sure, that the reason I talked to Fred at all would probably have been because on initiating my first call to Schmit, he may not have been in the office, and I may either have been referred to Fred, or in terms of a transfer call, or I may subsequently have called him as an alternative.

Q What if anything did you say to Mr. Grossman requesting him to not honor any contract between American Hospital Supply and Mr. Sheridan in National Catheter?

A Absolutely nothing.

Q What if anything did you say to Mr. Grossman requesting that American Hospital Supply not deal with National Catheter?

A Nothing.

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(p.147 l.8 -- p.147 l.14)

Q Yes. Now, referring again to Defendant's Exhibit B, on September 24th, 1963, you advised Mr. Sheridan that he was to have -- and I quote -- "All the responsibilities and authority of that office being president, subject, of course, only to the direction of the Board of Directors." Is that correct?

A That is exactly what it says here.

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Q And will you tell the ladies and gentlemen of the jury what it is, sir?

A Well, this was sort of an introductory button that Mr. Bair sent out to the salesmen at Aloe Company, the Aloe Division, telling them of the advent of this acquisition of Sheridan operations and what he felt its meaning would be for the Aloe Division of Brunswick Corporation.

Q This is a communication from Mr. Bair's office to be sent to all hospital men in the country, was it not?

A All of Aloe's hospital salesmen, that's right.

THE COURT: What is the date on it?

MR. ARNESS: August 24, 1960, Your Honor.

THE COURT: All right.

MR. ARNESS: I may make more use of the document later, Your Honor, when and if we introduce it into evidence.

Q But for the moment, may I ask Mr. Willman to read paragraph 2 on the first page?

A "We have the best scientific brain in the entire surgical plastic field in the person of Dave Sheridan. His genious is such that he was in demand by many people. Several fine firms had wanted to acquire him and we feel very fortunate that he is happily at home in our company."

(p. 175 l. 14 -- p. 175 l. 25)

Q Did there come a time further, Mr. Willman, specifically in the fall of 1964 when you asked David Sheridan to step down from his position as [illegible]d of Catheter Division and become a senior scientist with that organization?

A Well, I don't know whether it was in the fall of 1964 or not, Mr. Arness, but I am sure there is a document that will demonstrate the time it was, but yes, I asked him, not to step down, but to recognize reality because he hadn't been the head of the division almost since its inception, in fact, he had been only in title.

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(p.216 l.20 -- p.217 l.6)

Q It is a very desirable feature when using a tube for suction purposes to be able to see the path of the fluid?

A That is absolutely correct, it is highly desirable in many, many instances.

Q So in that connection, there is no adequate substitution for a conductive line tubing, is there?

A There is no adequate in that circumstance. You can't serve your purpose of conductivity and visual perception of fluid passing unless the tube is also transparent at least in some part of its circumference.

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MR. ARNESS: And I am referri
to page 38 and 39, Mr. Tucker.

Q -- these questions were asked of you and if you gave these answers:

"Question: With respect to the first clause in paragraph 5B which concerns the features or configurations of an integral bubble or funnel or bubble, was it Brunswick's intent to prevent Mr. Sheridan, as a result of this provision, from making a funnel through the use of a heated mandril?

"Answer: No."

Further, continuing your answer, "The answer to that question is no. A jillion other people can make funnels with mandrils. We have no objection to his making funnels with a mandril.

"Question: Are you aware, Mr. Willman, that a claim was made against Mr. Sheridan for the manufacture of a funnel through the use of a heated mandril?

"Answer: No."

Do you recall those questions and answers?

A Yes, I do recall them now.

Q And they were true, of course?

A Certainly.

(p.223 l.14 -- p.223 l.19)

Q Right. Mr. Willman, on the day that you called Mr. Schmit of American Hospital Supply, was it your position that Mr. Sheridan was precluded by the agreement of May 28, 1971 from making any conductive line tubing?

A Yes, sir.

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(p.236 l.15 -- p.236 l.19)

Q Fine, all right. Now, Mr. Willman, so that that is not hanging in the air, you have already told us you intended that to mean that Mr. Sheridan couldn't make any conductive line tubing, didn't you?

A Yes.

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(p.237 l.20 -- p.240 l.11)

Q Referring to the deposition again, Mr. Willman, that was taken of you December 10, 1975, I am now referring to page 73 which has a part of a long answer that is to a question on page 71. Well, let me read the whole thing.

MR. TUCKER: Is Counsel starting

with the question on page 71?

Q On page 71 was this question asked you and did you give this answer:

"Question: My question is simply, from your knowledge of Mr. Schmit and American Hospital Supply, did you know the effect of the information you conveyed to him would be that American Hospital Supply would not purchase the tubing, at least for some time?

"Answer: To the best of my knowledge, Mr. Hensler, that thought, it may have crossed my mind, but that thought in no sense formed any part of the basis for my reason for calling Schmit. You must realize that by this time Dave Sheridan was in competition with us, generally, and we knew it. I had been by his plant and watched the various stages of its construction. I didn't go for that purpose, but I had to go by it to go to our plant. I knew he was competing with us and I really wasn't particularly concerned about it. I simply took the view that there were these things, and I am repeating myself, that we had purchased and were paying Sheridan for on the premise that we had from

Sheridan, exclusive right to. I wanted American to know that if they did not know it, and I had no reason to know that they knew. I wanted them to know that we had these rights from Sheridan and we were going to defend ourselves, and we were going to move to protect them. Let me put it to you this way: If I was going to go out and try to stop Sheridan from competing with us at this level, I would have been on the telephone with a lot of friends I had in the industry long before that just because he was making tubing, but I never called a soul, never communicated with a soul. I mean, to pick on American Hospital Supply in an effort to get American orders after those several years of Sheridan competing with us in the tubing market, would never have crossed my mind, but to let American Hospital Supply know if they were indeed about to do it, that they were buying something or contemplating buying something that might get them, through inadvertence on their part involved as a co-defendant with Dave Sheridan in a lawsuit that we were going to prosecute.

It seemed to me, considering my long association with the company, my admiration for it, I would be very, very much, in my opinion, it would have been contrary to common sense not to call them and tell them."

Did you give that answer?

A I certainly did, every bit of it, every word of it.

Q So you wanted them to know that if they persisted in buying something, they might end up as a co-defendant in a lawsuit?

A No, that is not what I said there.

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(p.244 l.4 -- p.244 l.10)

market, would never have crossed my mind, but to let American Hospital Supply know if they were indeed about to do it, that they were buying something or contemplating buying something that might get them, through inadvertence on their part, involved as a co-defendant with Dave Sheridan in a lawsuit that we were going to prosecute. It

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(p.244 l.19 -- p.245 l.22)

Q And at the time that you called Mr. Schmit, did Sherwood have any competitors in the field of conductive line tubing?

A As manufacturers?

Q As sellers, distributors.

A Yes, as sellers, to the best of my recollection, we did, because I believe, I think I am correct,

that we were offering conductive line tubing and/or bubble tubing without a line to the market through dealers competing with the Aloe Division of Sherwood.

Q Let me rephrase my question then, Mr. Willman. Was there any of it being sold that Sherwood didn't manufacture?

A No, that is the reason I asked you the question. You opened me up to the answer I gave. Not to my knowledge. Sherwood at that time was the only manufacturer of such tubing.

Q All right. And then Sherwood then had a monopoly on that tubing, didn't they?

MR. TUCKER: That is a legal conclusion, Your Honor. I think that he should define what he means by a monopoly.

THE COURT: Sustained.

Q It had no competitors with respect to that tubing, did it, sir?

A It had no competitors producing the same tubing.

Q Producing conductive line tubing?

A Not to my knowledge.

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(p.254 l.3 -- p.257 l.22)

Q And with respect to the second agreement, did you testify that in the second agreement you made some changes in the language at Mr. Sheridan's request?

A Oh, yes.

Q What were those changes?

A As I recall this whole discussion with Mr. Sheridan about his assuming the role of senior scientist, he gave me some indication, not of agreement, but of the fact that were he to assume this role, he would like to retain the title of president of the Sheridan operations. And this second letter --

Q Referring to Exhibit N?

A Referring to Exhibit N, it says, however, you would continue to carry the title, but not the normal duties of president of Sheridan Corporation or the Sheridan Division. I told him we would be happy to concede that status to him, the title of president.

Q And after Mr. Sheridan declined to sign Exhibit N, what if any changes were made in his manner of compensation at Brunswick?

A Well, the only change that was ever made, to the best of my recollection, in Mr. Sheridan's

compensation is that we increased his salary from some twenty-two thousand five to, I believe, 10 percent more than that, or something in the neighborhood of twenty-four, twenty-five thousand dollars. But at no time during any of this discussion was there any implication even that Mr. Sheridan's compensation would suffer by virtue of his assuming the role of senior scientist. The whole reason for the proposed move was that, in effect, Mr. Sheridan, granted, he didn't have the normal degrees and kudos that some people associate with being a scientist, but he was, in my opinion, and in every respect, a scientist. And he was functioning in this role not only at the catheter plant but also from time to time throughout the division elsewhere. He was involved in meetings with other of our technical people who were benefiting from the exchange, scientific exchange with Mr. Sheridan, as I hope he was with them. And we were also at this point in time realizing that what has now become Sherwood Medical Industries was put together by acquisition, and then nurtured, and what-have-you, to become the company it is today. We were in the throes of reorganizing the company at that point still under the Brunswick mantle in a

functionally integrated way, and in so doing, we were in the throes, I think, if my memory serves me right, it was during the year 1964, we were taking our manufacturing facilities, considering them just that, and that is what, actually, the Argyle plant had been since its inception. And I will be happy to explain that if anyone cares to hear, organizing them as production facilities with their marketing centrally controlled out of the headquarters in St. Louis, and it just made sense that since this had been going on with regard to the Argyle plant for some years, this form of functional management, if you will, of that activity made sense, since we were going to carry forward the reorganization of the total division in a manner functionally organizing it, and at that time, recognizing that Mr. Sheridan's role for the one that it was, that of senior scientist. There is one other man in the division who is also the owner of a company that we bought, a subsidiary company, that I also approached at that time or about that time to assume that role, and he very happily and willingly did, and continued in that role until his retirement, I think, in the past year. But this was the reason for it. And I guess that is a speech

rather than an answer to a question, but those are the facts.

Q My point is, sir, what if any change was there in Mr. Sheridan's job responsibility as a result of his declining to sign the proposed senior scientist agreement?

A None.

Q And what if any change was made in the compensation he received?

A None.

Q And did he continue to receive the royalties, sir?

A Certainly.

Q And were those royalties, again, the entire output of the plant and not specific patents?

A Yes, sir. I might also mention that he was also, of course, receiving royalties from production using the patents outside of those plants. By this time we had a plant operating in -- wait a minute. Sixty-four, no, we did not yet have a plant operating in St. Joseph, Missouri, but subsequently, when those plants went into operation, he received royalties on production out of those factories.

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(p.263 l.2 -- p.264 l.16)

Q Mr. Willman, based upon your experience in the hospital supply field, for how many years have hospitals been employing the procedure known as suctioning?

A Well, long before, I am sure, but to my knowledge, ever since I was a high school kid I used, before school, to watch surgery at St. Joseph's Hospital.

Q Was that before conductive tubing came on the scene?

A Oh, that was a long time ago, yes, indeed.

Q Now, you testified also that you felt Mr. Sheridan was precluded from making conductive line tubing as that term has been defined here, sir, is that correct?

A Yes.

Q Prior to participating in this litigation, have you heard the term conductive line tubing to describe suction tubing, generally?

A Suction tubing is suction tubing. That is the phrase that is used.

Q Is there a generally accepted definition used throughout the hospital supply industry which has the name conductive line tubing?

A Yes, I would say that Sherwood has promoted that name or that designation, conductive line tubing.

Q You are referring to the tubing which started to be manufactured in 1960 and has been used for suctioning thereafter?

A When I refer to conductive line tubing, yes, that is what I am referring to.

Q Mr. Willman, you spent a fair amount of time reading to the jury, word for word, from paragraph 5 of the settlement agreement which is the subject of this litigation. When you called Mr. Schmit in American Hospital Supply, did you have that same paragraph in mind?

A I certainly had the same paragraph in mind, yes.

Q And was it your belief that that paragraph was applicable to the clear conductive tubing that we are talking about here?

A Certainly.

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Testimony of Eli Katz

(p.294 l.15 -- p.296 l.17)

Q By making reference to the suction machine, Plaintiff's 16 for identification, and this vacuum bottle, Plaintiff's Exhibit 15 for identification, continue to explain this process known as suction.

A The surgical team needs to suck, they need a vacuum to get the liquids and garbage out of their way. We have two ways, really, to do it. One, you can do it with a portable vacuum pump, suction pump, which is similar to what you see here where you have an electric motor, pump and a tube coming out of it. The other way you can do it is with a

centrally installed system which would be in the hospital where there is one huge, huge pump down in the machine room with the pipes running through the building, and then you have outlets in each operating room. The thing would work if we just came over to the end of it here or we came off the wall outlet in the operating room.

Q Explain what you mean by came off --

A Oh, this is the inlet of the pump where it is sucking it into the pump, or if it was a wall outlet on the wall over there where we would plug in a piece of hose. If we just suck into that, it would work for a while, but it would become clogged up with dry blood and everything else that gets sucked out of the body, and as the hospital engineer, it causes me a mess because we have got to clean it up or service the pump. So what the technique calls for, you come out of the pump, go through a piece of tubing to an interceptor bottle. Here is the interceptor bottle. That is on the one-piece unit. This is an interceptor bottle of one type that might be mounted on the wall or sit on the floor stand in the operating room.

MR. TUCKER: May the record reflect

that when the witness stated that this is an interceptor bottle on the pump, he was referring to a bottle on Exhibit 16 for identification, and when he said this is the interceptor bottle that goes with the wall unit, he was referring to Plaintiff's Exhibit 15 for identification.

THE COURT: All right.

A (Continuing) And we come to a bottle which we put a vacuum pressure on, and then we come off of the bottle, either the kind on the pump or the kind that is the freestanding bottle, and we then run another piece of tubing either along the floor or draped in some way so it gets where the nurses or doctor who is going to use the suction tip can work with it. And the idea of the bottle is to intercept all the liquids so they won't clog up my pump or my pipes.

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Transcript of March 31, 1976
Testimony of Eli Katz (continued)
(p.316 l.17 -- p.319 l.10)

Q Mr. Katz, based upon the hospital experience which you described for us yesterday, how would you characterize the extent to which clear conductive tubing is used in hospitals for suctioning purposes?

A In the operating room setting in the last few years it seems to be used in most of the hospitals that I have seen.

Q What would be a fair estimate of the percentage that that works out to?

A The ones I have seen, at least ninety percent of the suction tubing is this one with the black stripe on them.

Q And to what extent, for purposes other than suctioning, is this product used, based upon your own personal experience and observations?

A The main thing it is used for is suctioning and I have seen it around the hospital, both in the surgical suites, out of the surgical suites, used in a very low volume for all kinds of miscellaneous purposes where somebody needs a piece of tubing, and that was what they chose to use.

Q Mr. Katz, at my request, have you undertaken to analyze the National Catheter clear conductive tubing, a sample of which is Plaintiff's Exhibit 11, and the Sherwood clear conductive tubing, a sample of which is Plaintiff's Exhibit 4, with a view toward determining the relative similarities, if any, and differences, if any, between those two types of tubing?

A Yes, I have.

Q And based upon that analysis, do you have an opinion as to whether those types of tubing are similar?

MR. ARNESS: Objection, Your Honor. I think he should point out what he has found as the difference, and what he found as similarities, but not

to characterize them.

MR. TUCKER: I think I am entitled to go about it this way, Your Honor, but if he wants me to put the bottom line in question --

THE COURT: I am going to accept it. Under our new rules, they are quite liberal on these expert's opinions, even taking a lay opinion.

MR. TUCKER: Thank you, Your Honor.

Perhaps we could have the question read back.

(The pending question was read back by the Reporter.)

A Yes, I do.

Q What is that opinion, sir?

A The opinion I have come to is that they are similar.

Q Would you please describe for the jury what you have done in order to arrive at that opinion and what, and how, what you have done to assist you in coming to the conclusion which you have just described? And I will, for purposes of this testimony, lay before the witness, Plaintiff's Exhibits 4 and 11 in evidence.

A When you came to me with this question, are they similar or are they different, and if they are different, what is the difference, I thought about how to go about it, and what I came up with was to

look for differences, look at everything I could about the two things, list what was exactly the same, which was almost the same, and what were the differences. And the main thing in going about this that I was looking for are, what are the differences, and then to evaluate each difference and see if it meant anything and the way it was used. In order to do this, I obtained samples of the tubing that came from both manufacturers and then went about a whole series of tests and examinations and so on with them.

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(p.323 l.20 -- p.327 l.3)

Both brands of pre-cut, pre-packaged units have a connector at each end of it. Both brands of the unit that is offered in rolls comes with connectors at, I think, it is three or five or six-foot interims, so that you have convenient connectors right on the roll along the whole length of this tubing, and it

comes from instructions to cut it at a connector so you can fasten them together. The connector systems on the two have a lot of similarities, and they have a lot of differences. On the one brand, the connector is an integral part of the tubing itself. It is a flared, widened portion.

Q Would it be fair to call that a bubble?

A I wouldn't. I would call it a flared, widened portion.

Q Are you referring to the Sherwood brand which is Exhibit 4?

A Yes.

Q The other one has a connector that is a separately made piece, it is the black piece that is fastened to the ends of the package tubing or at intervals along the one that you buy in the long length on the packaged version. Would you hold it up so the jury and Judge Foley can see it?

A All right. This is the one end; this is the other end.

Q In one hand, would you tell the jury, in one hand, what you are holding, and the other?

A Okay. In my left hand I have the National Catheter brand unit which has the black connector at the end, and in my right hand I have the Argyle, Sherwood

brand tubing which has a flared connector at one end and a, call it a flared, and then tapered connector at the other.

Q And in your left hand are you holding Exhibit 11, and in the right hand are you holding Exhibit 4, for the record, please?

A Yes.

Q Now, proceed with your explanation.

A All right. On the connectors, the black connector which is both ends of the National Catheter, is a flared end, and then tapers or necks down to a narrower diameter which is at both ends. The shape and function which they advertise is self-clamping, self-sealing, I feel, is similar to the female end of the Argyle's tubing which is also flared outward.

Q When you say Argyle tubing, are you referring to Sherwood tubing?

A I will try to use Sherwood. It is Sherwood tubing.

Q They are both made in Argyle.

A The other end of the connector on the Sherwood tubing is this bubble section, and it appears that instead of cutting it in these lengths at the wide portion, which is where the male end is, they created a female connector end by cutting it further along the length. This female-male connector on the Sherwood is one of

the differences from the National Catheter end. In a number of the uses in the hospital and in another version that it is offered, you can get the Sherwood tubing with two female ends, and in doing some tests or in using it in the hospital other than O.R. uses where we had this male-female version, I would snip off the end to create a double female and just as on the National Catheter.

Okay. That is the analysis of the connectors. The National Catheter is also offered with another connector or system which is available in the long, long length where you can it comes with a piece of tubing, conductive tubing, as well as a little different shape of the connector piece that has been added on. That seems to be a convenient way for the hospital people to get that connector piece which I have seen them use with the Sherwood brand, and they had to go out and cut or find a piece of metal tubing or plastic tubing to use in that same way. Okay. I am trying to get all the tests in order.

I also ran conductivity tests of the two brands in similated use conditions going through the connectors. My readings were substantially the same with any differences in the

reading, I contribute to the resistance between my test clamp and the point where I connected rather than the difference in the tubing.

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(p.329 l.7 -- p.329 l.25)

A On this one the black line is over here. If you have black line touching black line, you have a very obvious thing following. We know black is conductive, clear is not. We go from here, a conductive path, so the electrons can run along through here, through to the next, and we do have this conductive path. Now, if it is put on this way or, you know, just at random, the black won't touch the black, and if we test it in a laboratory dry, or we did it right now, there would not be a conductive path or an apparent easy way for electrons to run from black to black. What happens though --

A JUROR: The black is going to touch, the two blacks have to touch?

THE WITNESS: If the blacks touch, you have a black to black conductive path. If the blacks don't touch, then you have a black to moisture.

A JUROR: It wouldn't work?

THE WITNESS: It does work.

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(p.332 l.10 -- p.338 l.14)

Q Mr. Katz, based upon your experience that you have described for us in operating room safety procedures, what significance, if any, do you attribute to the fact that the Sherwood tubing does not state, in connection with the U.L. label, that the two black lines have to be connected together in order for the tubing to be safely used.

MR. HENSLER: Your Honor, I object to that again. I think that depends on what U.L. Underwriter's Laboratories determine, and I think that is beyond the scope of the witness's knowledge. He can testify as to what he has observed through his personal experience and what he knows, but he can't testify about why U.L. did or did not put something on a tube.

MR. TUCKER: If the Court please,

the witness in his position, I respectfully submit, can testify both to codes such as the N.F.P.A. 56-A, and to the general standards which are used in the industry or in a particular field of his expertise. Now, we have had testimony that there is a U.L. label on this tube, and that the U.L. label does not say you must connect the two black lines to use this safely. I think the witness is competent to testify as to what a person experienced in this field would attribute to that fact without getting into whatever reasons U.L. may or may not have had.

MR. HENSLER: Your Honor, one further point, if I may be heard on it, is that there is no showing at all that U.L. tested the connection. The witness has testified that where these tubes are connected, the black lines don't touch it is not conductive. There is no indication that U.L. has even tested two tubes connected together, and that is really the point in issue here. Unless that can be demonstrated, I don't think there is any basis for the witness to testify why the tubing does not state that the black lines must touch. I think that has to be put in as foundation material before the witness could offer any opinion on that.

MR. TUCKER: I would submit, we are

now arguing on a different question, but I would ask that we have a ruling on the particular question that I posed and not on some other one about why U.L. didn't say anything or U.L. said something.

THE COURT: We should go back to your first question, and maybe you can remember it yourself. Can you?

MR. TUCKER: Well, my question was, based upon your experience in this industry, what significance, if any, do you attribute to the fact that the U.L. label which appears on Plaintiff's Exhibit 4, the Sherwood tubing, does not have next to it, a statement that in order to be safely used, the black lines must be connected.

THE COURT: And your objection is to that?

MR. ARNESS: Yes, Your Honor, I think that is beyond the witness's knowledge, and I think there is nothing showing that Underwriter's Laboratories even tested the joint between the two pieces of separate tubing. I think before any testimony can be given on that, there would have to be some showing that Underwriter's Laboratory put the tubes together and tested to determine whether they are conductive or not. The witness has already

testified they are not conductive unless the black lines touch. This is with respect to the Sherwood tube.

THE COURT: Your question here, and what we are aiming at is, the Sherwood tube that is Exhibit 4.

MR. TUCKER: That's correct, Your Honor.

THE COURT: And the U.L. label or something.

MR. TUCKER: Yes.

THE COURT: Does it say anything about them being connected?

MR. TUCKER: That's right.

THE COURT: The black line?

MR. TUCKER: Nothing on the U.L. label requires that, and I asked the witness what a person with his experience, as he described for us, what does a person with such experience contribute to such a fact.

MR. ARNESS: Again, it necessarily requires the witness to testify about what Underwriter's Laboratory had in its mind when it required certain legend to be put on the tube. He simply is not in the position to do that. He didn't work for Underwriter'

Laboratory. He wasn't privy to the test, and this question necessarily requires him to express an opinion on that.

THE COURT: Well, I will take his opinion. I think he is qualified to make that opinion.

MR. TUCKER: Thank you, Your Honor. Perhaps we can have the actual question re-read.

THE COURT: The Reporter may have to know which one. The last question asked, is that the one?

MR. TUCKER: Yes.

(The pending question was read back by the Reporter.)

THE COURT: Do you have a judgment?

THE WITNESS: Yes, I do.

THE COURT: Do you have an opinion on it?

THE WITNESS: Yes. As I told you all before, I did my tests, and as I explained to you, when the two black lines aren't touching on the Sherwood brand if I test them dry, as they had been in lab conditions, there is not a conductive path, and if I test them wet, as it would be, in my mind, in real life conditions, there is a conductive path

and a static mitigating path along the length of the tubing. And I equate that with the words in N.F.P.A. 56-A, saying that it shall be conductive in as used conditions, and the conclusion I came to, therefore, is that the tubing with that connector system where it is most likely that the people using it in the O.R., if they use that male-female, won't have the black lines touching, it is safe to use. That was my own thinking. I then feel very, very much more comfortable when the U.L. label and U.L. listing comes out to find that there is nothing in the U.L. listing that makes a big deal about having to connect them together along the line. I consider that supportive of my thinking. It makes me feel a good deal more comfortable with my own thinking.

BY MR. TUCKER:

Q Have you completed your answer to that?

A That is my answer.

THE COURT: Wouldn't it be better to line up the black line, then you would be sure, wouldn't you?

MR. TUCKER: It is a fair question, Mr. Katz.

THE WITNESS: You get some of the girls in the O.R., as I say, who are very, very exact

and go better, then better, then best, or better, even good enough, and they line up the black lines.

THE COURT: Well, if you were there, wouldn't you want them lined up, if you were a patient?

THE WITNESS: One of the things I use in my talk in my teaching, and it really happened to me, is how would I feel if it was that way with my own kid on the operating table, and I made the mistake of going to a case once where my kid was on the table, and I wouldn't care either way.

THE COURT: All right.

THE WITNESS: If my own kid was on the table, if that line was lined up or not.

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(p.339 l.3 -- p.339 l.10)

The next thing is, if you cut the tubing perpendicular to its long length, if you just take a slice of it and you look at the end, you see that the Sherwood tubing has the black stripe going all the way through it from the outside through to the inside. And if you take the same slice out of the National Catheter tubing, you find that the black stripe is only on the outside.

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(p.348 l.20 -- p.350 l.14)

In working with static electricity items, our goal is to keep this excess of electrons from being so excessive that it is going to jump through the air, so we create a convenient reservoir

and a convenient way for any excess that we may create to get equalized to the reservoir, which in the operating room, we have designed one and we have said it is the conductive floor. But in reality, it is the whole world. It is the pipes in the wall, it is the frame of the building, it is the whole place. In an operating room itself though, we really wouldn't care if we took that operating room and isolated it or insulated it from the entire world. As long as everything in that operating room had the same amount of electrons, it wouldn't jump through the air. So from the purest standpoint, we don't care if the operating room is grounded or connected to earth or not, as long as everything in that operating room has the same number of electrons on it so it won't jump through the air. So for electrostatic purposes, grounding doesn't mean anything.

Q When you said for electrostatic purposes, are you referring to static electricity?

A Static electricity.

Q And to what extent is grounding relevant to static electricity?

A The terms just don't interchange. It has no relevance

Q And to what extent is grounding relevant to current electricity?

A It is a very different thing in both fire safety and

current electricity safety.

Q And just so the record can be clear, with respect to the tubing we are talking about here, are we protecting ourselves against a static electricity hazard or a current electricity hazard?

A The purpose of the tubing being used around -- the two brands being used around funnel anesthetic are to prevent against static electricity as a source of ignition.

Q Are there also procedures in the operating room protecting against current electricity hazards?

A Yes.

Q Are they relevant to this kind of tubing?

A No.

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(p.361 l.3 -- p.361 l.16)

Q Let me ask it this way then: If the two lines do not meet at the point of connection on the Sherwood tubing, would the tubing meet the Standard 56-A in the absence of moisture?

A I can't answer it because my interpretation of 56-A is under use conditions where moisture is present.

THE COURT: Well, he wants you to assume there is no moisture.

A (Continuing) If there is no moisture, the electrical resistance between here and here would be greater than one mil ohms.

Q In other words, if there is no moisture present, it wouldn't comply with the standard, would it?

A No.

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(p. 366 l.5 -- p. 369 l. 4)

Q Now, Mr. Katz, you testified that you made a note of a number of differences between the tubing. You testified, did you not, that in one piece of tubing the conductive line was on the top of the tube, whereas in the Sherwood tubing, the line ran all the way through the wall of the tube, is that correct?

A Right.

Q You also testified, did you not, that the connectors on one tube were integral or made as part of the tube, whereas on the National Catheter tubing, they were made separately?

A Right.

Q And you also testified that the connectors on the National Catheter tubing were black, whereas on the Sherwood tubing, they were clear, is that correct, except for the conductive line portion?

A I don't think I said that, but it is substantially true.

Q Is that correct?

A Yes.

Q And would it be fair to say that the connectors on the

National Catheter tubing are conductive throughout, that is, all the way around, whereas on the Sherwood tubing they are only conductive in the line portion in the absence of moisture?

A Right.

Q You also testified, did you not, that the Sherwood tubing was conductive along the inner portion, the inner circumference of the tube, if I can use that term, whereas the National Catheter tubing was not?

A Right.

Q And you testified further on that point that in use, that really made no difference?

A Right.

Q But there was that difference?

A Yes.

Q You also testified, did you not, that the Sherwood tubing customarily has what they call a bubble in it, whereas the National Catheter tubing never has a bubble?

A Right.

Q That is another difference?

A Yes.

Q You testified that with respect to the flexibility of the tube, that the flexibility of the National Catheter tubing and the Sherwood tubing was about the

same?

A Right.

Q And isn't it true that the flexibility of non-conductive plastic lines would be about the same also?

A Right.

Q All right. So whether the tubing is conductive or not, so far as the flexibility, the tubing is going to be about the same?

A No. I think if you look at the black tubing there, you will see the flexibility is different.

Q Right. I am talking about plastic tubing, not rubber tubing.

A Okay. I think that is plastic, but right.

Q Okay. So the flexibility then, you wouldn't expect to be different between two pieces of plastic clear tubing, is that correct?

A Right.

Q You testified with respect to the packaging, that both the National Catheter tubing and the Sherwood tubing are sold in coils in some cases?

A Yes.

Q Isn't it also true that non-conductive tubing is also sold in coils?

A Yes.

Q So with respect to that similarity, that would apply not only to conductive tubing but also tubing which had no conductivity?

A Right.

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(p.373 l.9 -- p.375 l.10)

Q Mr. Katz, does Standard 56-A contemplate laboratory use or actual use?

A Actual.

Q Was it designed to tell people how they should set up their tubing in a testing laboratory?

A In part, yes, yes.

Q Was it designed to tell people how they should set up their tubing in the actual O.R. environment?

A Yes.

Q When you testified that if the lines didn't match and the inside of the tubing was dry, the resistance would be beyond the limit specified by Standard 56-A, why was it you would not take the next step and say, therefore, Standard 56-A would be violated?

A Repeat your question.

Q When you testified that if the two lines were not connected, as we went through before, and the tube

was operating in the absence of moisture, the resistance factors specified in Standard 56-A would be not met, why would you not take the next step and testify that, therefore, Standard 56-A would not be met?

A Because there is a specific phrase in the paragraph that I read before from 56-A which says it should be tested under use conditions.

Q And may I ask you to read to the jury, the precise paragraph to which you make reference, noting for the record that I have given the witness Exhibit 14 in evidence which is indeed Standard 56-A.

A Okay. I am back on page 57 again, paragraph 4624.

"Tubing and connectors used for suctioning shall provide a continuous electrically conductive pathway to the vacuum bottle and to the vacuum outlet. The material used shall be conductive throughout or where it is necessary for visual monitoring, may be of anti-static material with anti-static properties good for the specified life of the material, provided they embody a continuous integral conductive pathway designed so that in normal use, the conductive pathway shall make and maintain conductive contact with conducting materials. Electrical resistance of such tubing and connectors

shall be not greater than one meg ohm when tested as specified in 465."

Q Does that language contemplate laboratory use or actual use?

A The words in there, actual use.

Q Thank you. So that the record can be clear, is it your testimony, therefore, that when the black lines are used in suctioning and are not connected, is Standard 56-A met or is it not met?

A It is met.

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(p.388 l.23 -- p.389 l.5)

Q Now, Mr. Katz, you have had called to your attention, a number of items during cross-examination having to do with the differences and similarities of the tubing that we are concerned with here. My last question is, simply having had those items called to your attention, what if any effect did that have on your opinion that the two are similar?

A I feel that they are similar.

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Transcript of April 6, 1976
Testimony of Mrs. Billie Rogers
(p.506 l.22 -- p.521 l.4)

Q Well, when you were Head Nurse, and I think that that is approximately a two-year period from the mid-70's through mid-72, are you able to state how many surgical procedures you participated in during that period?

A Well, under my supervision, there were about forty a week.
Q Forty a week?
A Approximately.
Q Are you able to do the requisite mathematics to come up with a total for the two year period?
A Well, fifty weeks, and that is 2,000 a year.
Q Then that would be 4,000?
A Yes, 4,000.
Q During the nearly four years that you have been O.R. Supervisor, are you able to estimate how many surgical procedures took place in Operating Rooms, operating under your direct supervision?
A Over the past four years since I have been supervisor, we are averaging 600 procedures a month.
Q And they have taken place in Operating Rooms under your direct supervision?
A That is right.
Q I won't even try that. That is over 7,000 a year, or quite a considerable number?
A Quite a few.
Q And were these surgical procedures, the same kind of surgical procedures that you have already testified about?
A Yes.

Q I would like to show you a sample of tubing which is Plaintiff's Exhibit four, and are you familiar with tnat kind of tubing, Mrs. Rogers (Offering)?

A Yes, I am.

Q And what kind of tubing is that?

A That is section conductive.

Q We have been having a little bit of problem with calling this tubing 'argyle' tubing, if you would, could we refer to it as Sherwood tubing?

A Yes.

Q And is that known by any other name?

A Well, clear conductive tubing.

Q And for what purpose, if any, is that used in surgical procedures?

A For suctioning in the Operating Room.

Q Would you describe very briefly for the jury what suctioning is, and how that tubing such as Plaintiff's Exhibit four, is used to accomplish it?

A Well, during surgical procedures any time there is an open wound, there is bleeding, and any surplus fluid has to be taken away from the site so that the surgeon can see. So therefore, this tubing is connected to a vacuum, or suction machine on one end, and then at the other end the suction tip is used, to the surgeon's prefe.ence, and then he uses it to take away that fluid.

Q I am now showing you a sample of tubing that is Plaintiff's Exhibit eleven. Are you able to identify that tubing (Offering)?

A Yes.

Q What is it?

A It is clear conductive suction tubing, made by the National Catheter Company. That is the National Catheter Company.

Q And what kind of tubing do you use at St. David's for suctioning, at the present time?

A Sherwood Clear Conductive Tubing.

Q And Plaintiff's Exhibit number four?

A Yes.

Q And for how long has that been the case?

A Since approximately 1968.

Q And what did you use at St. David's for suctioning during surgery prior to that time?

A The old black conductive tubing; rubber tubing.

Q I am showing you what has been marked as Plaintiff's Exhibit one (Offering)?

A Yes.

Q And is this the sample of the black conductive tubing that you have just described?

A This is the type, yes.

Q Mrs. Rogers, what is a nasal cannula -- C-A-N-N-U-L-A?

A It is a small plastic tubing that has two little -- I have to use my hands to do it -- two small tips that fit into the nares to administer oxygen with.

Q And to what extent, if anything, is that used in Operating Room procedures?

A It is not used in St. David's Operating Rooms. It isn't used in our Operating Rooms.

Q Where, if at all, is it used at St. David's?

A In a recovery or patient's room, where they require oxygen.

Q To what extent have you seen tubing such as Plaintiff's Exhibit four, or Plaintiff's Exhibit eleven used as a nasal cannula?

A Never.

Q To your knowledge, is such tubing generally used for such a purpose?

A No.

Q Could you tell us what an oxygen connecting tubing is?

A It would be a plastic tubing used to carry oxygen from one place to another. I have seen it used during some cardiovascular procedures, where the heart-lung machine was used and oxygen taken from the lxygen outlet, and placed into the oxygenator.

Q And to what extent is tubing such as Plaintiff's Exhibit four, or Plaintiff's Exhibit eleven, in your experience,

used as an oxygen connecting tube?

A It has never been used.

Q To your knwoledge is such tubing generally used for such a purpose?

A No.

Q Can you tell us what a feeding tube is?

A It is a small catheter or piece of tubing that is used -- well, the main use of what it is for is for infants to feed them, and it is put down into the stomach. and it has a connector that you can use with a syringe to put food in.

Q And to what extent, if any, is that type or kind of tubing used in surgical procedures?

A Very seldom. I have seen it used, where it goes into the bladder.

Q And in your experience, is tubing such as Plaintiff's Exhibit eleven or four used for such a purpose?

A No.

Q To your knowledge,is such tubing generally used for that purpose?

A No.

Q What is an anestnetic administration tube?

A A tube that is used to administer the anesthesia gases from the anestnesia machine to the patient to put them to sleep.

Q That is used during surgical procedures?
A Yes.
Q And to what extent have you seen tubing such as Plaintiff's Exhibit four or Plaintiff's Exhibit eleven used as an anesthesia administration tube?
A Never.
Q To your knowledge, is such tubing generally used for that purpose?
A No, it isn't.
Q Based upon the over 30,000 surgical procedures that you have participated in, or that have taken place in Operating Rooms operating under your direct supervision, what machines, devices, or other equipment used during surgery, involve the use of tubing of any kind?
A Well, the anesthesia machines, and the I.V.'s. The I.V.'s that would have the I.V. tubing, and the heart and lung machine, and the C.R.Y.O. units.
Q Pardon me?
A The C.R.Y.O. units.
Q What about a suction machine?
A Certainly a suction machine.
Q And you have heard testimony about the use of tubing with the suction machine and the anesthesia machine, is that correct?
A Yes, that is correct.

Q And on the I.V. set up, how is tubing used in an I.V. set up?

A Well, the tubing is connected to the bottle of I.V. fluid, and it is hanging, and then it is connected to the needle that is inserted into the vein of the patient.

Q And in your experience, to what extent have you seen tubing such as Plaintiff's Exhibit four, and Plaintiff's Exhibit eleven used --

A Never.

Q -- used in that connection?

A Never.

Q What does I.V. mean?

A Intravenous.

Q And how is tubing used in connection with the heart and lung machine during surgical procedures?

A Well, it is to circulate the blood from the -- it is used to the heart and you have to have tubing that puts in the blood and circulates it through, and oxygenates it at that time.

Q To what extent is tubing such as Plaintiff's Exhibit four or Plaintiff's Exhibit eleven used for that purpose?

A It isn't.

Q And to you knowledge, is tubing of that nature generally used for that purpose?

A Not -- no.

Q And what is a C.R.Y.O. machine?

A Yes, the C.R.Y.O., and that is the machine that is used as a liquid gas for freezing. It administers liquid gas, and it is used in cataract surgery, and there are, I think, numerous procedures. We use it in cataract surgery for the eye.

MR. LIVINGSTON: Is everyone able to hear?

BY MR. LIVINGSTON:

Q What sort of tubing is used in the operation of a C.R.Y.O. machine?

A That is a conductive hose that comes with that machine. It is made onto that. It is a black conductive hose.

Q And to what extent is tubing such as Plaintiff's Exhibit four or eleven generally used for that purpose?

A Never.

Q Have you ever seen it used for that purpose?

A No.

Q Other than those about which you have already testified, are there any other purposes for which tubing is used during surgical procedures?

A Not that I can think of right now.

Q I would like to direct your attention to certain features of these two kinds of clear conductive tubing, or suction tubing (Offering). Now, directing your attention to Plaintiff's Exhibit eleven, the National Catheter

tubing, I would like to point out that the black line on this tubing rests on the outer surface of the clear plastic tubing. whereas in Plaintiff's Exhibit four, as you can see, the black line is an intricle part of the tubular wall, and it forms part of both the inner and outer surface of the tube. Do you see that?

A Yes.

Q Now, I further direct your attention to the fact that because on the National Catheter tubing the line rests on the outer surface of the tube, it might be possible to connect an alligator clip, and do you see that (Indicating)?

A Yes.

Q And in your experience, how many times have you seen someone attempt to do that, and that is, attach an alligator clip to suction tubing during surgical procedures?

A I have never seen it done.

Q Based on your experience, what, if any, purpose would be served by attaching an alligator clip to suction tubing during surgical procedures?

A I can't think of any purpose.

Q I also would like to direct your attention to the fact that because the National Catheter line rests on the outer surface of the tube that it might be possible

to cut out the section of the clear plastic so that you have a space with a black line left intact. Based upon your observation, can you tell us what purpose that would serve during surgical procedures --

MR. ARNES: I have hesistated to object, and although the young lady has testified that she can identify Exhibit eleven, she has never testified that she used it in her hospital, and I believe that, therefore, unless that should be the case and that background is established, that these questions are not permissible.

She is now being asked about uses that somebody who uses this tube might make of it, and she has never testified that she has used it.

THE COURT: What is your position on that?

MR. LIVINGSTON: I would say this: the witness has participated in or supervised over 30,000 surgical procedures, and these surgical procedures include about every kind of surgical procedure there is. And I think that she is certainly qualified to offer an opinion as to how something might be used, or how or to what purpose it could be put, and this tubing, National Catheter Tubing could be put in a section of the clear plastic tubing, and this could be cut out --

MR. ARNES: (Interrupting) Your Honor,

the basis of my objection is that in these procedures, that she has had something to do with, they have always been performed with the other tubing that doesn't have these features and it hasn't been shown that she has had any experience with this other tubing.

MR. LIVINGSTON: The Defendant's trial brief, and I think in their opening statement --

THE COURT: (Interrupting) I assume that you are anticipating something in the Defense, are you not, on these questions?

MR. LIVINGSTON: I would like to call Mrs. Rogers back on rebuttal, of course, but in consideration of her convenience, it may not permit that. They have taken a position, the Defendants have, that there is a significant difference, and the fact that on this tube, the National Catheter tubing, you can cut out a piece of clear plastic, and the black line remains intact.

THE COURT: That refreshes me, and I remember that, and I will allow it because of her training and expertness. I will take it as a lay opinion, under our new rules.

BY MR. LIVINGSTON:

Q Do you recall that question?

THE COURT: You can go back now. Do you

recall the question? Do you recall that cutting out a part leaves the black line?

THE WITNESS: You will have to state it again.

BY MR. LIVINGSTON:

Q Directing your attention to Plaintiff's Exhibit eleven, the National Catheter tubing, based upon your experience, what, if any purpose, would be served by cutting out a section of clear plastic and thereby keeping the black line intact, and no clear plastic under a section of it, during surgical procedures?

A I can see no purpose in it.

Q Thank you. Now, I would like to direct your attention for just a moment to the connectors on these two kinds of tubing. To what extent would it be possible to hook up two sections of, or one section of the National Catheter tubing, Plaintiff's Exhibit eleven, and a section of the Sherwood tubing, Plaintiff's Exhibit four?

A It can be connected like this (Demonstrating).

MR. LIVINGSTON: With your permission, I would like to show this to the jury, Your Honor.

THE COURT: Certainly.

(The tubing was shown to the jurors.)

BY MR. LIVINGSTON:

Q Now, Mrs. Rogers, I will show you once again, the

Sherwood tubing, Plaintiff's Exhibit four, and you stated, I believe, that you have used that kind of tubing for suctioning during certain surgical procedures at St. David's since approximately 1968, is that correct?

A Yes, that is correct.

Q How is that tubing connected to the vacuum bottle?

A Taking this and connecting it to the little tube that comes out of the top of the vacuum bottle.

Q I see. In your experience, how many times have you seen the Sherwood tubing fall off the suction bottle or the vacuum bottle during suctioning?

A I have never seen it fall off.

Q How many times has it been reported to you that the Sherwood tubing has fallen off the vacuum bottle during suctioning?

A I have never had it reported to me that it has fallen off.

Q How many times has that connection between the tubing and the vacuum bottle leaked in your experience?

A Not any ; never.

Q Has it ever been reported to you by anyone in an Operating Room, operating under your direct supervision, that the connection between the tubing, the Sherwood tubing and the vacuum bottle, had leaked during suctioning?

A No.

Q In your experience, to what extent has it been necessary to connect one piece of the Sherwood tubing to another piece of the Sherwood tubing for use in suctioning?

A We use two pieces together in almost all procedures because the first piece of tubing is connected to the vacuum, the suction bottle, and it comes down just outside of the sterile field.

The other package of sterile tubing is opened on the table, the sterile table, and the nurse that handles the instruments takes this piece of tubing, and she connects one end to her tip, or suction tip, and then hands the other end to the nurse, the circulating nurse who is not scrubbed and sterile, and she connects these two pieces together.

Q How does she do that?

A Like this (Indicating).

Q In your experience, how many times have you seen the connection between two pieces of Sherwood tubing fail during suctioning?

A Never.

Q How many times have you seen it leak during suctioning?

A Never.

Q Has it ever been reported to you by anyone working in an

Operating Room, operating under your direct supervision, that the connection between the two lengths of Sherwood tubing has failed or leaked during suctioning?

A No, it has not.

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Testimony of Charles Tremblay
(p.549 l.24 -- p.551 l.8)

Q And at my request, Mr. Tremblay, have you ever taken to create a duplicate of the National Catheter Tubing,

a sample of which is in evidence, as Plaintiff's Exhibit twenty-one?

A Yes, I have.

Q And were you given a piece of tubing which you were asked to duplicate?

A Yes.

Q Who gave it to you?

A You did.

MR. TUCKER: I would ask that the Clerk mark as Plaintiff's Exhibit thirty-one for identification, this six-foot length of National Catheter Tubing bearing the catalogue number 1027-20.

THE CLERK: Plaintiff's Exhibit number thiryt-one, marked for identification.

(Tubing marking Plaintitff's Exhibit thrity-one, for identification.)

BY MR. TUCKER:

Q Would you return to what we have marked as Plaintiff's Exhibit thirty-one for identification, and state whether you recognize that?

A Yes, I do.

Q And what is that, sir?

A That is National Catheter's conductive line tubing.

Q And is that, in fact, the tubing which you were asked to create a duplicate of?

A Yes, it was.

Q Having been delivered that sample of tubing, what did you then do, in general terms?

A Basically, I went back and got a hold of one of my operators, and told him what I basically wanted, and he set the product up, and I would say within fifteen to twenty minutes we had tubing with a line in exactly the same configuration as this one.

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(p.560 l.4 -- p.561 l.8)

Q Mr. Tremblay, based upon your eight years of experience that you described for us, and speaking strictly from your position as a person who deals with extrusion, do you have an opinion as to whether Exhibit four, which is an example of the Sherwood tubing that we are talking about in this case, is tubing which is or which incorporates features or configurations of an extra line similar to the product manufactured by National Catheter, of which Exhibit eleven is the same?

MR. ARNES: I object.

THE COURT: What is the basis?

MR. ARNES: He has not been qualified as either a patent or a scientific expert. He is a production foreman and an extruder.

THE COURT: I think, under our new rules, as I have read them, a lay opinion can be taken, and it can be taken on the ultimate issue of what is -- well, for what it is worth.

I overrule it and the jurors will be told, and I think that they have set in on other cases, and they will weigh his qualifications and his background in determining the worth of his opinion, which is a lay opinion.

MR. TUCKER: I fully agree.

BY MR. TUCKER:

Q Have you such a opinion, Mr. Tremblay?

A Yes, I do.

Q And what is that opinion?

A The basic extrusion technology involved are exactly the same.

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(p.561 l.19 - p.562 l.3)

Q Mr. Tremblay, your testimony is, then, that once shown Plaintiff's Exhibit eleven, or Plaintiff's Exhibit thirty-two, which is the National Catheter conductive line tubing, once shown this tubing, an experienced extrusion operator like yourself, could produce the tubing?

A Yes, sir.

Q In other words, once the identity is known, the extrusion techniques involved are not that complicated?

A No, they are not.

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Testimony of Stanley N. Garber
(p.589 l.16 -- p.589 l.24)

Q Right. Have any claims been made at any time during this litigation with respect to what is called the integral funnel?

A Yes, at one time in this litigation, there was a claim asserted by Sherwood that Mr. Sheridan was improperly making a funnel connector, and that claim was then later withdrawn by Sherwood.

Q Voluntarily withdrawn by Sherwood, is that correct?

A Yes, it was.

Transcript of April 7, 1976
Testimony of George W. Nebel
(p.597 l.1 -- p. 597 l.7)

Q And when you use the term 'Argyle' what business are you referring to?

A Argyle is a line of medical products consisting of tubes and catheters, medical tubing, intravenous cannula and other supplies.

Q And that is a division of Sherwood Medical Industries?

A Yes.

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(p.610 l.3 -- p.614 l.18)

Q Without going into detail at this point, would you please state in general, what this chart is, which is Exhibit thirty-five, and what it purports to be?

A It is a sales chart in millions of dollars, over the years 1969 through 1976.

Q The chart in its left margin contains the legend 'Sales in millions of dollars' in that left margin, and that is next to a vertical line going from the bottom of the chart to the top of the chart. What, sir, does that mean?

A That ranges from one million to ten million in sales in any particular year, along the horizontal axis which indicates the year, and where they cross is the year in question. In other words, the 1.5 at 1969 is the sales in millions of dollars, and that is one million five hundred thousand made by Sherwood of clear conductive suction tubing in 1969.

Q From what source of information did you obtain that one and a half million figure?

A I obtained it from the Sheridan Royalty Report.

Q And what is the Sheridan Royalty Report?

A That is a computer printout of all sales of products on which we paid Mr. Sheridan a royalty for the use

of patents.

Q And does the Sheridan royalty report reflect individual sales of clear conductive tubing?

A Yes, it does; yes.

Q And to what extent is that royalty report kept and maintained in the regular course of Sherwood's business?

A It is a regular document from which we paid royalty.

Q And do I correctly understand your testimony to be that the chart shows that in 1968, one and a half million of clear conductive tubing was sold by Sherwood?

A That is correct.

Q And may I direct your attention to the chart, above 1970 next to which number 2.2 is placed. And what does that represent?

A That is 2.2 million. May I say smoething? All of these are rounded out to the nearest $100,000.00.

Q And what does that 2.2 figure tell us?

A That is $2.2 million dollars of sales of suction tubing by Sherwood.

Q And what was the source of information for that 2.2?

A Sherwood Royalty REport.

Q And may I direct your attention next to the entry on the chart above 1971, and that is 3.1, and do you see that?

A Yes.

Q And what does that 3.1 represent?
A It represents the fact that they sold $3.1 million dollars worth of clear conductive tubing in 1971.
Q And what source of information did you rely upon for that figure?
A The Sheridan Royalty Report.
Q And it shows above 1972 a number 3.6, and please state what that represents, and what is the course of information for that?
A The 3.6 million in sales by Sherwood of clear conductive suction tubing obtained from the Sheridan Royalty Report.
Q In the year 1972, is that right?
A Yes.
Q And with respect to 1973, what does that chart show about Sherwood sales in 1973?
A Sherwood sales in 1973 were 4.4 million worth of clear conductive suction tubing obtained from the royalty report.
Q And what about 1974?
A For 1974, it shows we sold 1.1 million worth of clear conductive suction tubing.
Q And for 1975?
A For 1975, it shows 4.32 million worth of sales of clear conductive suction tubing.
Q And the source of the information for those two years

was what?

A Also the Sheridan Royalty Report.

Q And on Exhibit thirty-five, which is in color, the color of the line changes from red to black during the year 1976, and I believe that on the chart which we have given to the jurors and Counsel, the line becomes dotted?

A No, dashes.

Q And what does the 1976 figure of 4.5 represent?

A That was my forecast prepared in 1975 and what our sales would be in 1976.

Q And is that the forecast that you have described for the jury previously during your testimony?

A Yes, it is.

Q Mr. Nebel, let me refer you now to a line on the chart which appears to be green, and let me note for the record that on the xeroxed copies that same line is a dash,dot, dash, dot. And what, in general, does that line represent, sir?

A That projects our sales for the years 1974, 1975, and 1976, and the average annual growth of nineteen and one-half-percent per year.

Q And what lead you to select nineteen and one-half percent per year as an average annual growth?

A I went through -- I did a history of the product since

its inception in 1962, and calculated the average annual growth through 1973, a period of eleven years.

Our average annual growth during that eleven-year period was 53.6 percent.

Q And what does that mean in everyday figures?

A That means that the business increased about half each year. In other words, if we sold one thousand dollars last year, we would sell $1,500.00 and next year half of it would be the $1,500.00 and that is the way it progressed, and roughly 53.6 percent.

Q And do you use that 53.6 percent to project future sales during the years 1974, and 1975?

A No.

Q Why not?

A Because I thought that was too long a history to reflect what was happening in the market today. The product started in 1963 with modest sales of $50,000.00 and it grew to 1969 to a million and a half dollars, and

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(p.621 l.17 -- p.622 l.13)

A Because another product came on the market, a product manufactured by Davol, and it came on in September of 1974.

Q And what was the Davol product?

A The Davol product?

Q What was the Davol product?

A It is a clear tube, with a conductive line.

Q And used for what purposes?

A The same purpose as our product.

Q And what is that?
A A suction tubing insertive.
Q Now, in computing your numbers for 1975, did you make an effort to correct, if you will, for Davol's entrance into the market?
A Yes, I did.
Q And what did you do?
A Since I had no knowledge of their sales, I went to the H.W.S. report, again --
Q That is the same report that you identified?
A Yes, it is. And while H.I.S. showed no impact of Davol in 1974, they showed that they had gained a 10.6 percent market share in 1975. I then used that 10.6 percent,

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(p.649 l.10 -- p.651 l.10)

Q Mr. Nebel, I show you that document which has been marked as Defendant's Exhibit W for identification, and ask you whether you can identify that document?
A Yes, that is what we call 'Argyle Product Facts,' on conductive bubble tubing.
Q And would this be the information contained or would that be the type of information furnished to the salesmen who sell the Sherwood conductive bubble tubing, and conductive connecting tubing?
A Yes, it would.
Q And I am going to ask you to refer to the last page of that document -- what is the date on that document?
A April, 1969. That is April 21st, 1969.
Q Thank you. I am going to ask you to refer to the last

page of the document, if you will, and I am going to ask you whether there is any information on that page with respect to whether the black lines, the conductive portions, that is, of the Sherwood tubing, should be joined together when the tubing is connected?

A There is a statement.

Q And that is in question and answer form, is it not?

A Yes, it is.

Q I wonder if you could read the introductory section, there, which is next to the word 'notice'?

A 'Two questions come up from time to time about our conductive tubing.'

Q And does the first question refer to some other subject, does it not?

A Yes.

Q But the second question refers to the matter about which I just asked you, whether the black lines should be touching when the tubing is connected?

A Yes, it does.

Q I wonder if you could read question number two and answer number two, if you would.

A Question number two,' When connecting two Argyle conductive tubes together, do t[illegible]nductive lines have to touch for the line to be conductive?'

Now, the answer for number two, 'Tests have proven it makes no difference whether the black lines touch or not. It is conductive both ways.'

Q Now, is this the type of information which the salesmen would have, in dealing with customers with respect to the Sherwood conductive tubing?

A Yes, it is.

Q And this is the type of information then which is to be passed on to customers, is it not?

A Passed on? You mean this is passed on?

Q No, the information is?

A Yes, the information, yes.

Q Thank you.

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(p.656 l.14 -- p.657 l.2)

Q Mr. Nebel, I will again refer to, first of all, to the chart which has been marked as Plaintiff's Exhibit three-five. Now, I ask you with regard to the years 1969, 1970, 1971, and 1972, that chart indicates that the only company in the market was Sherwood Industries?

A The only company in the market on the clear conductive tubing, is that what you mean?

Q Yes.

A Yes, it does.

Q So for those years, Sherwood Industries had the entire market, did it not?

A For that tube, yes.

Q For those years?

A Yes.

(p. 672 l. 25--p. 674 l. 4)

Q With respect to what you have testified were lost sales, did you make any attempt to determine why Sherwood lost sales?

A Why we lost sales? We lost sales to National Catheter product by reports from the salesmen because of competitive activity in the field, and by that I mean by designing the product and pricing the product.

Q Well, the question then that I would ask is whether you made any agreement to determine why Sherwood lost sales during the period, and did you make any attempt?

A Yes.

Q Now, what did you do to attempt to determine why Sherwood lost sales?

A I had knowledge of American Hospital's entry into the market with the National Catheter product. I began to see reports coming in from the field on their weekly reports, that some accounts were in jeopardy because of National Catheter's activity, and not because of American Hospital's activity in the field.

Q Were there any other reasons?

A I am sorry, what?

Q Were there any other reasons that you learned that Sherwood was losing sales?

A Were there any other reasons?

Q Any other reasons?

A No.

Q National Catheter or American Hospital Supply, that was a sole reason that you were able to determine that Sherwood was losing sales?

A Yes.

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(p.681 l.9 -- p.681 l.22)

Q Yes. My question was during the period from 1972 to 1974, were you aware that there was a request or that there was dissatisfaction, I should say, being expressed by Sherwood customers concerning Sherwood connector ends?

A Are you talking about the lack of certain sizes, or certain types of connectors?

Q Yes, I am including that.

A The answer to that question is, yes, we had requests from customers who wanted either two funnels, two tapers and they might want a tube thirteen feet long instead of our twelve feet long, and we make all different lengths. If you call that dissatisfaction; I call that a customer's requesting our product to be modified to fulfill their specific requirements.

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(p.685 l.7 -- p.686 l.11)

THE WITNESS: 'This is in response to your recent note, and the question, first of all do we plan in the future to market this, and this,' and then my answer was , ' we do not intend to add this tubing of this type of connector in the near future and I can only supply one of two alternatives: first

of all has the customer been properly instructed that they can convert a tapered connector to a funnel connector? Secondly, if this is not acceptable to them, I would suggest that you go to the Argyle plant on the standard request form for quotation, and request pricing and minimum runs on this item for the hospital. If I could be of any further help, please let me know.'

I gave two alternatives to satisfy the customer's request.

BY MR. HENSLER:

Q Is it fair to say that the first alternative was to use the tube that had already been produced?

A Correct.

Q And you did indicate, did you not, that the type of tubing which was covered by the request was not going to be produced in the near future?

A That is correct. When a salesman requests something, he wants to do it now. So I would not tell him that we were going to do it six months from now. That would not help him.

Q And you did not tell him that you were going to do it?

A No. I did not tell him that we wouldn't do it ever.

Q You just told him that you were not --

A I was just trying to satisfy his request.

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(p.687 l.12 -- p. 687 l.22)

THE WITNESS: This is 'Problems with Conductive Connecting Tubes. Customer wants two funnel connectors. Losing business to N.C.C. We need twin funnel connectors as standard. Too expensive as custom.'

BY MR. HENSLER:

Q All right. Would it be fair to say that that was one occasion on which Sherwood was advised that one of the reasons for losing sales to National Catheter was the failure to supply two funnel connectors?

A It appears that way, yes.

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(p.694 l.16 -- p.694 l.23)

Q Mr. Nebel, did you ever learn that Sherwood was losing sales because of the price being charged for conductive tubing?

A Yes, I did.

Q And how did that fact first come to your attention?

A I cannot tell you the first time I heard about it, or from whom I heard it the first time, but it came from someone in sales management.

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(p.696 l.16 - p. 697 l.25)

Q If the customer wanted conductive tubing -- well, let's go back to a period 1971, prior to National Catheter manufacturing conductive tubing?

A Yes.

Q That a customer wanted clear conductive tubing, and it had to buy the tubing from Sherwood, did it not?

A Correct, we were the only supplier.

Q And if the customer did not like Sherwood's price, it

had not choice if it wanted the clear conductive tubing?

A On clear conductive tubing it had a choice to buy another tubing.

Q But there was no other clear conductive tubing?

A That is correct.

Q If it bought clear conductive tubing it bought it at Sherwood's price?

A That is correct.

Q Now, you testified that you became aware that Sherwood was losing sales, say in 1974, because of its price on the clear conductive tubing?

A Well, I would have expressed it because of pricing by our competitor.

Q Your competitor sold the tubing at a lower price?

A T[illegible]s correct.

Q An[illegible] so the customers bought the tubing at the lower price?

A That is correct.

Q And therefore Sherwood lost sales?

A That is correct.

Q And did Sherwood cut its price then to meet the competition, in some cases?

A In some cases. Sherwood did not change its published price.

Q But it did cut some prices to some customers to meet the competitor price, did it not?

A Yes, sir.

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(p.700 1.19 -- p.701 1.25)

Q Mr. Nebel, could I ask you to refer to the second page of that document and read the last entry on the document?

A 'American went into University of Illinoise, Chicago, with twenty-foot tubing, with conductive line. Undercut us $6.00 a case. Norb is getting samples and literature--' and there is some reference to money here that I cannot read.

Q I think that that is sufficient.

MR. TUCKER: I have no objection to this one (Offering).

BY MR. HENSLER:

Q Now, I ask you to refer to another document which is marked as Defendant's A(g) for identification, and ask you whether you can identify that document (Offering)?

A That is a communication from Ray Goof to Bill Nelson, and it is dated 5/29/73.

Q I ask you to refer to the last paragraph of that document, and I will ask you to read that document to the jury.

A 'This American Salesman in Fred Matthews territory is really going after the conductive tubing business, and Fred has lost all of his business. What are we going to do about our pricing? Let's don't sit by and lose more of our business before we reduce our price and then try to regain lost business. It is much harder to get it back after losing it.'

MR. HENSLER: Are you finished with the next one?

MR. TUCKER: No, I am not.

BY MR. HENSLER:

Q Let me ask you this: did there come a time when you did begin to cut your prices then to meet competition?

A Selectively, yes.

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Q Are you aware that there were complaints with respect to the fit of the Sherwood connectors?

A I have heard that, yes.

Q And do you know whether you -- Sherwood lost any sales as a result of complaints concerning the fit of the connectors?

A I personally know of no lost sales.

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Transcript of April 8, 1976
Testimony of Mark Ayer
(p.895 l.7 -- p.897 l.15)

Q Is conductive line tubing used as the Washington Hospital Center?

A Yes, it is.

Q And what type of conductive line tubing has been used at the Washington Hospital Center during the period that you have been there?

A Since I have been there we have used two types. We used the original one, when I started to work there, and that was the one we referred to as the Argyle tubing

Q Is that the tubing manufactured by Sherwood Medical Industries?

A Yes.

Q That is the tubing which we have been referring to throughout this litigation as the Sherwood tubing. Let me ask you, Mr. Ayer, if you can examine this exhibit which has been marked as Plaintiff's Exhibit four, and tell me whether you can identify that (Offering)?

A Yes, this is what we refer to as the Argyle tubing,

and it is manufactured by Sherwood.

Q And for what period of time was that Argyle tubing used at the Washington Hospital Center?

A Approximately a year and a half.

Q And is it still used?

A This tubing?

Q Yes.

A No, it is not.

THE COURT: When was that year and a half? What time period?

THE WITNESS: When I first went to work at Washington Hospital Center in 1973.

BY MR. HENSLER:

Q You began in 1973? And it was used for a year and a half?

A In 1973 -- let me see, April to -- yes, about a year and a half.

Q Could you -- you will have to speak out loud so that the Court Reporter can get what it was. What period was it used for, to the best of your recollection?

A Approximately a year and a half.

Q And during what period?

A From 1973 to early 1975.

Q And did there come a time when the use of that tubing was discontinued at the Washington Hospital Center?

A Yes.

Q Can you tell me how that came about?

A The particular problem with the tubing was that I had encountered, or it had been reported to me , and that I encountered it myself, was a leakage problem in two specific areas. One, when the tubing had been used for a day, all day, and not been changed, where the connection fit had become stretched, and there was leakage around it.

The other point at which leakage occurred was when it was disconnected from the suction canisters and there was no positive pressure on it, there was leakage.

Q Did you personally observe the leakage of this tubing?

A Yes, I did.

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(p.903 l.1 -- p.904 l.1)

Q As a person -- incidently, as Administrator of the Operating Rooms at the Washington Hospital Center, do you have any responsibility for the selection of this equipment and the tubing that is to be used in the Operating Room?

A Yes, I do. It is part of my job.

Q And are you experienced with respect to the selection of tubing and catheters?

A Yes.

Q As a person experienced in that area, I am going to ask you to examine Plaintiff's Exhibit four, and Plaintiff's Exhibit eleven, and tell me whether, in your opinion, those two types of tubing would be readily distinguishable to a person experienced in the use of catheters in an Operating Room?

A Yes, they would.

Q And how would you distinguish those two types of tubing?

A Well, the Argyle, as we refer to it, and I keep going back to that because that is what we always called it; it has a bubble. This tubing has not bubble in it anywhere. This tubing has the two black plastic connectors on the end, and the Argyle does not. The line in the Argyle is part -- the conductive line is part of the tubing, and in this one it is joined -- it is put on top of the tubing and glued onto the top of the tubing. Those are probably the main differences.

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Transcript of April 9, 1976
Testimony of Carroll Palmer
(p.958 l.22 -- p.960 l.8)

Q Mr. Palmer, is there any indication on the Issac Jackson patent, which I believe is Exhibit number B(g), as to whether the patent examiner there knew about and considered the prior patent issued to Mr. Sheridan?

A Yes, there is.

Q Will you tell us what that is, sir?

A On the face of this patent, there are listed in this particular patent, there is listed five different earlier patents. Now, as I explained to you, the patent examiner is required, in examining an application, to go and look at earlier patents to see if there is anything there that is close to the invention. He might look at the technical literature, and he makes a rather broad search, and from he looks at, he then selects those references, and we call them 'prior art references.' He then selects those references which he thinks are the closest, and he will, as I said, issue an explanation and maybe say, 'I cannot allow these claims because of this prior art.

And in this particular case, the Sheridan patent, this earlier Sheridan patent was listed as a prior art reference. So this shows that the patent examiner, in granting the issuance of this patent, had considered the earlier Sheridan patent.

Q And concluded what?

A He had concluded that the subject matter of the claims which the applicant was seeking to obtain were critically different from what has been disclosed and patented in this prior Sheridan patent.

Q Now, Mr. Palmer, I want to ask you if you could explain to the Ladies and Gentlemen of the jury both patents, and their essential features or characteristics, but before that, would it aid you in doing so to have available any diagrams or other descriptive material?

A It certainly would.

Q And do you have those in Court with you?

A I do.

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Q Now, would you proceed to, in any way you want to, explain first the Sheridan patent, and then the Jackson patent, and I think that would be more logical.

A Well, this enlargement shows a large scale, the front page of the Sheridan patent.

This is figure one, and there are five figures of drawings.

Figure one is what we call the fragmented enlargement view. If it were laying on the table and you were looking down at it, this is what you would see of the conductive line tube covered by the patent.

I hope that you can see here, there is a line, and two arrows that go in this direction, and beside them are the figures 'two-two.'

That is the scheme that is used in the patent drawings to indicate that the next view, two-two, is a Section through that tube, and you would be viewing it in that direction. That is called a 'Sectional view', and if you actually cut through the tube, and looked at the end of the tube, you would not see precisely what you see here, because the patent laws require whenever you have a section, that the section be hatched, and the hatching is different for different materials; plastic, rubber, glass, and metal, so that one who is experienced in looking at the patent drawings

can tell immediately what the material is in that section. Actually, if you had cut through the tube and laid it at the edge of it, you would see a circle here, and one there, and you would see that black area in there (Indicating).

All right, this is the conductive line tube of Sheridan. The conductive line is black, in the area up here.

Q Excuse me, but you are talking now about the Sheridan patent, but in the trial we have been calling this the Sherwood conductive line tubing because they are the one that is making it now. So I hope that you can use the word 'Sherwood' when you refer to it so that we don't confuse it.

MR. TUCKER: I apologize for interrupting, but we have not been calling that the Sherwood conductive line tubing, and I ask that that not be used.

THE COURT: I think that we should use the term of the patent. Does that show the Sheridan patent?

THE WITNESS: This is the Sheridan patent, Your Honor.

THE COURT: I think that we are clear on that. The jurors will be clear on that. That is Exhibit B(h)?

THE WITNESS: No, that is B(i), Your Honor.

THE COURT: All right, go ahead.

THE WITNESS: Figure two here, is a much larger enlargement than figure two of the drawing. It shows clearly the plastic, and in actuality this is clear pastic, and this is the black plastic. It is integral or embedded in the other plastic. This is clear, and this is black, and there is a substantially smooth outside surface, and a substantially smooth inside surface.

This is electrically conductive. This portion is not electrically conductive. This outside surface here is electrically conductive. This inside surface is electrically conductive.

The claims of the patent, and the coverage which was ultimately allowed in the patent, this conductive surface on the outside, and the conductive surface on the inside is an essential feature of the invention.

We have other --

THE COURT: Now, on figure two, so we will keep it clear, what is the Court Exhibit number?

THE WITNESS: That is Exhibit B(k).

THE COURT: That is Exhibit B(k),

Ladies and Gentlemen, and thank you.

THE WITNESS: All right. Before I discuss these additional figures, I would like to comment further upon patents, and the obtaining of patents.

One of the important things in obtaining a patent is to get for the client as broad a patent coverage as possible.

Now, it is a very unusual invention in which there can't be variations and modifications, and one of the tasks of the patent attorney for his client is to try to disclose in the application the various modifications that the inventor can seize on, so that there will be a full disclosure in the application of the modifications.

I might make an example. Suppose that a client came to me, as a patent attorney, with a new invention of a new style of dress. And as part of that dress, there was a zipper element. One of the first things I would ask the client would be, 'Can you use comething else in place of that zipper?'

The client may say, 'Yes, I could use buttons.'

'Well, how about something else?'

'Well, I could probably use snap

fasteners.'

'Can you use anything else?'

'Well, maybe a hook and eye.'

So in drafting a patent application on this new form of dress, the patent attorney would find it advisable to include these different ways -- well, other modifications.

In the patent trade we call them 'embodiments'.

Now, there is also a preferred embodiment, and that is the one that the applicant thinks is going to be the best, and perhaps if it is sold, that will be the one that will be used.

Then, we have the other embodiments and in this particular invention, we have a number of embodiments.

Here is the preferred one. This is the zipper. Then, here is the hook and eye, and here is the button, and here is the snap fastener.

Now, I will explain how these other embodiments differ from the preferred embodiments.

In this particular case, the plastic conductive material does not go all of the way through from the external wall to the internal wall. There is a portion here in which the clear plastic is

contiguous. But we have a conductive portion on the outside which presents a smooth continuous surface, which is electrically conductive.

And likewise on the inside we have a smooth continuous surface which is elctrically conductive.

So you see the similarity between these two. Although there is some difference, they have this in common. The smooth outer-inner surface, and a portion of which is electrically conductive would be on the outside and on the inside.

Now, in this embodiment, we have a plurality of these conductive portions: one, two, and three. Still with the same common characteristics of a smooth outside surface, and a smooth inside surface, and a conductive portion on the outside, and a conductive portion on the inside.

In this embodiment, instead of the conductive line being straight, it can curve.

So these are the essentials of the Sheridan patent as I have explained the presence of the conductive portion in the tube, the conductive line in the tube; a smooth outer surface, a smooth inner surface, and this portion, if it is one or several, is integrable or unmoveable with respect to this,

and it is a substantial or integral part of the whole, and both the inside and the outside surface of the tubing have conductive areas.

BY MR. ARNES:

Q Now, you have the next exhibit?

A Yes.

Now, Your Honor, the one on the left is exhibit B(h).

THE COURT: All right, thank you.

THE WITNESS: And the one on the right is B(j).

THE COURT: Thank you.

THE WITNESS: The enlargement corresponds to the first sheet of the Jackson patent. This enlargement corresponds to the second sheet of the Jackson patent, and as you see quite often in patent drawings, in order to get the most on the sheet, the sheet is turned sideways.

Here we see an end view of the tube covered by the Jackson patent. It is not connected, so there is no cross-hatching here, and you are looking at that tube, end on.

Here you can see that this is sectioned, and it has been shaded for sectioning which indicates that that tube has been cut through, and you are looking

through it at that direction.

The Jackson conductive line tubes are characterized by a piggy-back construction. The conductive line is on the outside of the tube, and it is held there by a welding action. There is no conductive element inside the tube. The conductive line can be separated from the tube, itself, without destroying the tube. A section with a conductive line removed can be cut from the tube, and still have conductivity between the two sections -- electrical conductivity between the two sections is already maintained.

The outside of the tube is not smooth because we have the protrusion of the conductive line and the piggy-back construction.

Connectors of several different forms can be applied to the end of the tube, to make electrical connection with the conductive line, and permit the tubes, when assembled, to be connected together electrically, or through some other equipment so that there will be an electric connection between the conductive line tube and whatever it is connected to.

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(p.971 l.12 -- p.971 l.18)

Q Mr. Palmer, are you familiar with the conductive line tube manufactured by other firms, other than National Catheter and Sherwood?

A Yes.

Q And what other conductive tubing are you familiar with?

A A tubing made by a company, I believe called Davol, and another by a company by the name of Bard.

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(p.974 l.11 -- p.977 l.14)

Q Now, Mr. Palmer, as a result of your acquaintance with these patents, and with the products involved, do you have an opinion with respect to whether or not the conductive tubing manufactured by National Catheter Corporation, Incorporated takes features or configurations of a conductive line, similar to the product manufactured by Sherwood, as of February, 1969?

A I do.

Q And what is your opinion?

A It is my opinion that they are not similar.

Q Now, Mr. Palmer, will you tell, in your own words, the Court and the Ladies and Gentlemen of the jury, why you come to that conclusion? What factors you relied upon, and if you would like to see the tubing or the displays again, or anything else to aid you

in your presentation, would you let me know?

A Well, I think that I could best accomplish this by taking some sections of the tubing and commenting on them.

Q All right. Well, we already have in evidence some of this.

A Yes.

MR. ARNES: First, may I have Exhibit number four and eleven?

MR. TUCKER: Yes (Offering).

BY MR. ARNES:

Q Now, I hand you what has been previously received in evidence as Plaintiff's Exhibit number four, and Plaintiff's Exhibit number eleven (Offering).

THE COURT: I have seen them.

THE WITNESS: May I take these down before the jury?

MR. ARNES: Is it permissible with Your Honor?

THE COURT: Yes. We should refresh our recollection, and you should tell the jury again what n umber four is; is that the Sheridan?

MR. ARNES: Number four is the Sherwood tubing, made under the Sheridan patent.

THE COURT: All right.

MR. ARNES: And number eleven is the

National Catheter tubing made under the Issac Jackson patent.

THE COURT: All right, go ahead.

BY MR. ARNES:

Q Proceed.

A The Sheridan, or the Sherwood tubing has bubble connections in it. The National Catheter tubing does not have bubble connections in it. The National Catheter tubing has black tubular connectors.

The Sherwood tubing does not have black tubular connectors on it. Instead, it has funnel connectors.

The tubular connectors of the National Catheter tubes are conductive all the way around the circumference. The funnel connectors of the Sherwood tubing is electrically conductive only at that point where the black line is.

The conductive line of the National Catheter tubing can be removed from the tubing without destroying the integrity of the tube. You will recall we saw that in that type of drawing in the exhibit.

The conductive line in the Sherwood tubing cannot be removed without destroying the integrity of the tubing.

The outside surface of the National

Catheter tubing is not smooth. You can feel the tubing and it has a piggy-back hump.

If we made a cross section through the tubing, we could not see any conductive portion on the inside of the tube.

The Sherwood tubing has a conductive portion both on the inside and the outside of the tube, and as I explained to you before, that is a critical feature of that type of tubing.

It is on this basis, these many distinction: that I have reached the opinion that these tubes are not similar in the features or configurations.

MR. ARNES: Thank you, Mr. Palmer. I have no further questions, Your Honor.

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(p.1016 l.14 -- p.1017 l.21)

the jury, I plan to rap up this soon. I believe that you testified on direct, Mr. Palmer, that your client in connection with this matter, was National Catheter Corporation, is that correct?

A That is correct.

Q But not Issac Jackson, the inventor?

A That is correct.

Q And with whom did you personally have dealings in connection with the preparation of this application?

A Mr. DAvid Sheridan.

Q And have you ever met Mr. Issac Jackson?

A Yes.

Q And when was the first time that you met him?
A About a year ago.
Q And when did you file this application? You filed it, I think that the record will show, in December of 1969. So you clearly did not know Mr. Jackson at the time that you filed this application?
A That is correct.
Q And had you talked to Mr. Jackson on the telephone?
A No.
Q And had you received any written communcations from Mr. Jackson?
A No.
Q And do I correctly assume that you submitted your bill for compensation to National Catheter Corporation in connection with the prosecution of this application?
A I think that that is probably right.
Q And if it wasn't National Catheter Corporation, to whom was it?
A It would be to Mr. David Sheridan.
Q And certainly not to Mr. Jackson?
A That is correct.

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Transcript of April 12, 1976
Testimony of Isaac S. Jackson
(p.1056 l.21 -- p. 1057 l.9)

So finally, I terminated my employment with Brunswick, and I gave notice and I terminated.
Q And when was that?
A That was in November of 1967.
Q What did you do next?

A Well, the first thing I did: as soon as I had severed with Brunswick Corporation, was to call Mr. Sheridan, and I asked Mr. Sheridan if he knew any place that I could get a job, and I was available for employment. He said, 'Well, why don't you come up and talk,' and that is exactly what I did.

Q And do you recall those talks resulting in anything?

A Yes. Subsequently I was hired by Mr. Sheridan to work for National Catheter Corporation.

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(p.1061 l.12 -- p.1089 l.4)

Q Did you hold any patents, Mr. Jackson?

A Yes, I do.

Q And how many do you hold?

A Well, I held two in which I am the sole inventor. I hold some in which I am a joint inventor. We have just been notified that another one has been granted on which I am a joint inventor.

I have applied for another one on which I am sole inventor. Also another one on which I am joint inventor. So that is eight patents, two of which are only pending.

Q Mr. Jackson, do you hold a patent for the manufacture of conductive line tubing?

A Yes, I do.

Q And when was that patent issued?
A That was issued May 25th, 1971, I believe.
Q And can you tell how that invention came about ; the invention on which that patent was issued?
A Yes. I was aware of the conductive tube that Sherwood Medical manufactured, having worked there, and I knew about it. And I also knew that if we could make a better tube, we would have a product of our own to sell. With that thought in mind, I started searching my mind for a better product. And I think that the spark for the whole thing come from a high school physics book which said that there are conductors, and there are non-conductors. However, everything to a certain degree is a conductor.

Also, in that same physics book and this is in a chapter on static electricity, I also noticed --

MR. TUCKER: If the Court please, the witness brought the book, and I think that it would be appropriate under the best evidence rule for him to make reference to it.

MR. HENSLER: I object to Mr. Tucker continually interrupting this witness. This is cross examination. If he wants to cross, I think that he should wait until his opportunity arises. He is

interrupting the witness at least six times.

THE COURT: Well, some of it was for clarification, because I think that if he is going to talk about a physics book in high school he ought to describe it and give the name of it.

MR. TUCKER: I resent being told that I interrupted the witness. Each time I have interrupted him, it was because he neglected to make statements which under any good foundation testimony for his background he should have made, and he neglected to say what courses he took, and so forth.

MR. HENSLER: I think it is proper cross examination.

MR. TUCKER: The best evidence rule requires that the document be produced, or that in the answers we be satisfied --

THE COURT: Some of your questioning should be reserved for cross examination. What was the high school physics book?

THE WITNESS: I have it with me.

BY MR. HENSLER:

Q Did you bring it today?

A I brought it. It is not on the witness stand with me but in my briefcase.

(The witness obtained a copy of a book

from his briefcase.)

THE WITNESS: Do you want me to continue?

BY MR. HENSLER:

Q If you would.

A That second paragraph said that if you are to apply a static charge on the inside of a conductive can, it would immediately appear on the outside. So putting those thoughts together, the design for the National Catheter conductive tube come about with the conductor filament on the outside.

Q Would you refer to the book that you got from your briefcase, and is that what you referred to?

A Yes, this is the book (Indicating).

Q Could you identify that for the record?

A It is called 'Elements of Physics -- Millican and Gale.'

MR. HENSLER: I am going to have this marked by the Clerk for identification, Your Honor.

THE COURT: What year was it published?

BY MR. HENSLER:

Q Yes, Mr. Jackson?

A It was 1927.

THE COURT: All right.

MR. HENSLER: May we have this marked for identification? I am asking that it be marked

for identification so that we can refer to it.

THE CLERK: Defendant's Exhibit B(p) marked for identification.

(Book marked Defendant's Exhibit B(p) for identification.)

BY MR. HENSLER:

Q Mr. Jackson, I ask you to examine that book which has been marked as a Defendant Exhibit BP for identification, and ask you whether that is the book to which you referred in your previous testimony (Offering)?

A This is the book.

Q Mr. Jackson, would you refer to the book, to the section which you have just mentioned in your testimony?

A Would you like to have me read it?

Q Well, to the extent necessary to explain it.

A It is a short paragraph, and if you would like to hear it --

THE COURT: Give us the page and the section.

THE WITNESS: The section is on static electricity, a chapter on static electricity, and the page is 245.

MR. TUCKER: May I be heard on this for a moment, please, first?

THE COURT: All right.

MR. TUCKER: Mr. Hensler, may we approach the Judge?

MR. HENSLER: Yes.

(Discussion at the Bench, which the Reporter was not asked to take.)

THE COURT: Is this where you got your idea?

THE WITNESS: Yes.

THE COURT: In this book?

THE WITNESS: Yes, that is right.

THE COURT: All right, how long did you have the book?

THE WITNESS: In 1930, some time.

BY MR. HENSLER:

Q Mr. Jackson, you were referring to certain portions of that book?

A Yes.

Q And I wonder if you could continue to do that?

A Yes. As I stated before, the first paragraph that was in the chapter was on static electricity, and this is on page 245, and it says that solutions of salt and acids and water are all conductors of electricity, and glass, porcelain, rubber, mica, shellac, wood, silk, vaseline, turpentine, parafin, and oils are insulators. It also says that no

hardfast line, however, can be drawn between conductors and non-conductors since all so-called insulators conduct to some extent, and tne so-called conductors differ greatly in the facility with which they transmit charges.

In the same chapter on page 251, there is a paragraph of an experiment and it has to do with electrical charges that are only upon the outside surface of conductors.

Then it says to let a deep tin cup be placed on an insulating stand and charged as strongly as possible from an electrical machine, and now a smooth metal bulb be suspended by a silk thread and it is touched to the outside of the charged cup, and then brought near the nob of the charged electroscope and it will show a strong charge.

But if it is touched to the inside of the cup, it will show no charge at all.

These experiments show that an electrical charge resides entirely on the outside surface of a conductor.

The result of this infers from the fact that all the little electrical charges of which the total charge is made up of repel each other, and therefore move through the conductor until they are

are on the average, as far apart as possible.

That is about it.

Q And what did those portions of the book have to do with your idea for this conductive line tubing, eventually?

A Well, up to this time, the only conductive tubing that was available was a conductive line which was exposed on the inside of the tube as well as on the outside of the tube.

And these two paragraphs that I have just discussed are related to me that possibly the conductive filament could be placed on the outside of the tube, and a continuous conductive pathway run end to end, and this is the basis of the invention.

Q Now, you referred in your testimony to the fact that you were aware of the product being manufactured by Sherwood?

A Yes.

Q And what were the differences between this conductive line tubing as you conceived it, and the Sherwood product?

A There is a vast difference. The difference is visual and it is physical, and functionally it is different. My invention, frankly, is a superior tube.

Q Superior in what way, sir?

A Well, for example, the conductive line which is

placed in the wall of the Sherwood tube is basically the same compound as the tube, itself, except they have added certain things to the compound to make it conducti-. d in so doing, the physical characteristics of the two plastics differ.

Q When you say the two plastics, are you referring to the transparent plastic and then the plastic which makes up the black line?

A Yes. The difference becomes apparent when it is extruded. The flow of the clear plastic is at a different rate than the flow of the conductive plastic. Consequently, there is an inherent bulge built into the tube at the portion where the line is exposed on the inside, and the line on the outside. In other words, there is a bulge on the outside, and directly opposite on the inside there is a corresponding bulge.

Q What significance do these bulges have, if any?

A Well, I think that the biggest one is that it is almost impossible to fasten that tube to a connector without having a leak. Now, leakage is a serious problem in an operating room. You don't want the contents of the tube to get on the floor, or on the hands of the operator, or whatever. It is serious.

So, that particular po t is a serious point.

Q Now, you have mentioned that you felt that the conductive line tubing which you had conceived was a superior product to the Sherwood product?

A Yes.

Q And you mentioned this leakage problem with the Sherwood tubing?

A Yes.

Q Are there any other respects in which you felt that your invention was superior to the tubing being made by Sherwood?

A Definitely. Has everybody seen the Sherwood tubing?

Q I think that we have it here. Yes (Offering).

I want to show you what has been marked as Plaintiff's Exhibit four, and ask you whether you can identify that (Offering)?

A Yes, this is a Sherwood Medical conductive tubing. And the part that I wanted to refer to was the fact that this end has a funnel connector, and this end has a tapered connector, and the idea being that you join one to the other, and this is the way that you put these things together if you want to join two tubes. You place them like so (Indicating), and the taper goes into the funnel.

Now, if you have a conductive line in the wall of this tube which is bulging on the inside,

and which bulges on the outside, and you put them together, what you have done is created a little channel right down the side of both lines, which is the place where the tube leaks.

And not only that, no place that I know of in their instruction or their advertising do they tell the user of this tubing how to put the connectors together. They say, 'Well, you take this end and put this end into it.' But it does not say that you have to line up the two lines so that they touch.

Now, if those lines do not touch, then you have an interrupted conductive pathway.

Now, the codes under which these tubes are made state, and these are my words, and I cannot remember the exact words, but they state --

MR. TUCKER: If we have some codes that are being referred to, I would like to have a foundation. I apologize, but to what codes is this witness referring to? If he is referring to pamphlet 56(a), it is in evidence, and he can refer to it.

MR. HENSLER: I don't think that it is necessary to get into that. If we do later, we will refer to it.

THE COURT: You should go to the Exhibit that we have.

MR. HENSLER: Certainly, if it is necessary to get into that, we will do that.

BY MR. HENSLER:

Q Now, you have testified with respect to this problem of leakage, and the problem about forming a conductive connection, and in the Sherwood tubing, and would you be able to demonstrate that to the jury from this?

A Well, we have done this many times in our laboratory. That is just as comparison between the products, and as a competitor's product, and yes, I could do it.

Q Would it assist you to use props?

A Yes, definitely.

Q And are those props present in this courthouse?

A Yes, they are.

MR. ARNES: We have them right outside of the door, and may I get them?

THE COURT: Yes.

Mr. Jackson, when you say you did it in your laboratory, are you talking about National Catheter?

THE WITNESS: Yes, National Catheter's laboratory, and it was routine company testing.

May I get up?

THE COURT: Yes.

MR. HENSLER: Mr. Jackson, can you

arrange this so that the Ladies and Gentlemen of the jury can see that?

THE WITNESS: I am ready.

BY MR. HENSLER:

Q Do you have your equipment set up for the first demonstration?

A Yes.

Q Could you explain that for the jury, and also for the Court Reporter, because he is going to have to take down a description of what this is. So if you could explain first the equipment, and then explain, as you go along, what is happening?

A Just a few seconds before you turn the lights off. To begin with, it is kind of hard to see the sparks with the lights on. The way to do this testing is put them in a darkened room. We can't do that entirely here, so I have done the next best thing that I could do. I have prepared this corrugated box and painted it black on the inside, and when you look into it you will see the sparks, and I will try and point out just exactly what is going on.

Now, what we have here, basically --

Q I am sorry to interrupt you. Keep your voice up for the Court Reporter, because you will be turned

away from him, and it will be difficult for him to hear what you are saying.

A All right. What we have here is a static generator, which is the same type of equipment that is in a high school laboratory, and such as this. They use it for demonstrating static electricity.

Now, this will be our source of static, and you will see sparks generated from it and going to the tubes that we put in there. In order to get the circuit, you also have to have a known ground and when I say a known ground, it means something that goes back to ground. In this case, it will be the heating radiator over there (Indicating).

So what happens is that if you generate current here, it will jump from here to the tubing, and back over to the ground, and dissipate. And it will keep sparking and you will see sparks coming and then you will see the sparking stop. This is the same type of electricity that you are faced with in the operating room.

Now, obviously, I cannot set up an operating room for you to see. But I have done the best I can. And now I am ready to turn off the lights.

THE COURT: All right. I am all right,

right here. Government regulartions say that we have to have the electrician turn off the lights.

THE WITNESS: Turn them all off so that we can see what it looks like. You can see this piece of tubing in there, and then I will let it flop back and forth as the sparks are generated and you can see the sparks jumping from the top down to the this tube, and on through the ground.

(The demonstration was performed by the Witness.)

THE WITNESS: Now, a good rule of thumb is that if you have a spark an inch long it is 50,000 volts, the same kind of a shock that you get as you walk across or if you walk across a nylon carpet and put your hand on the door knob, and that is what you get and it is the same thing that you see there and it is the same thing that you get in an operating room.

Now, the operating rooms are equipped with everything that they can to elimate static electricity. But you cannot take any chances. It has to be absolute and so, now, I will go ahead with my next demonstration. I will shut this off, and I don't like to leave that going.

Now, we will take this out of here and now I will show you what it was.

Before I do that, let's get it going again. Now, up in this area, up in here, up in the area up in here and you keep your eye on that, you will notice a second spark.

BY MR. HENSLER:

Q Excuse me, but what type of tubing is that in there?

A This is the Argyle tubing.

Q And is that the tubing manufactured by Sherwood Medical Industries?

A Yes, it is.

Now, look up in this area, and see up here and you can see that spark?

Q Will you describe for the Court Reporter what is occurring there?

A Well, the course of the spark is the bottom down here and it is traveling up to another section, where you are picking up another spark.

Now, I would like to take that piece of tubing out of there and show you what is causing that second spark.

This is just as it came out of there. This thing that I have got up there was just to suspend it and you can't touch it or you will get shocked every time you touch it.

Now, this is the funnel, and this is the

taper. They were put together like this with the line not touching. And what, in effect you have here, is a sparking gap. The very thing that you are trying to eliminate. The sole purpose of making a conductive tube is to conduct static electricity safely to a ground.

If you interrupt the conductive pathway at any point, by any means, you have ruined the whole concept, you have created a spark-gap, and that is exactly what you have in my hand here right now. These sparks that you saw jumping between this line and this line is a hazardous condition.

Now, I would like to take the tubing of National Catheter.

THE COURT: What about the lines if they are not lined up?

THE WITNESS: If they are lined up, you are all right.

THE COURT: You would not get the second spark?

THE WITNESS: That is right. You would not get the second spark.

THE COURT: All right.

BY MR. HENSLER:

Q. Mr. Jackson, could you show that Sherwood tubing

with the lines lined up, and please show that?

A Yes, certainly.

Okay, here is what I will do. I will take the two lines, and have them touch, and this is the way that they are supposed to be assembled. Now, they are like that (Indicating).

Now, this is as nearly as I can get it, and it was like this before, except the lines are touching. Now you have a continuous pathway from the source of static to the ground. This is the way it should be. If you see a spark down here it is because of the way I am holding it. That is the static electricity jumping to the tube. Don't regard that as of any consequence. This is placed up here where the tubes are joined together.

Now, there is your static electricity entering the tube down at the bottom, and up at the top you see no spark.

THE COURT: All right.

BY MR. HENSLER:

Q Mr. Jackson, what are you getting out now, for the Court Reporter?

A These are two foot section lengths of National Catheter, five millimeter conductive tubing. I have two lengths because our system is joining two tubes

together somewhat different from Sherwood. We have the funnel end in our tubes, and in order to join them, we provide, in the package, little male connectors. This also is conductive.

So I will do it like that, and put in one in here, and put this one in here, and then your conductive pathway is not interrupted -- just a second, please.

Now, your conductive pathway is not interrupted at any point from here through the connection, and on out this end to the ground.

Now, you will notice I have a little section torn away here. That is not part of the demonstration, but it does not in any way affect the working of the tube. I will hook it up just as if it was the way it was supposed to be.

I have used this for another demonstration, and you will see that, again, you will pick up the spark down here at the dome, but you will see no sparking up in here in this section, which is the section that we are concerned with; you will not see any sparking at all up there.

Now, you can see the connections up in there. Look in that area. Don't be concerned with this spark down here.

You can see the sparks going in and you don't see anything up above. Does everybody see it? Now, this is a major difference between the Sherwood tubing and the National Catheter tubing and it is of serious consequences.

So, you say that the tubes are different; they definitely are.

Now, I would like to show you another difference. Here again we have a five millimeter, National Catheter conductive connecting tube. One of the features of the patent of National Catheter's conductive tube is the fact that you can splice in, and what I have done here is splice in. I have taken a little stop-cock, which is a valve, and cut away the clear portion of the tubing, and preserved the conductive pathway between them. Does everybody see that? So in so doing, I have not ruptured the continuous pathway from the source to the ground.

Now, I would like to just put that in there and show you that it doesn't spark.

Now, watch up here at the valve.

(Whereupon, the witness activated the generator and demonstrated another procedure.)

Now, I will put it back in where it is darker, and you will see no sparks. So we have

spliced into the line, and we have preserved the conductive pathway, and we have more capability as far as the tube is concerned.

Okay, I will shut off the motor.

That was National Catheter.

Now, I have taken Sherwood Medical tubing, and done the same thing. I cut the tubing apart. Now, remember the conductive line on the Sherwood tube is exposed on the inside, as well as the outside. So the conductive portion is touching this valve. However, there is no continuous pathway from here to here and I will see what that does.

Q Can you show the jury, the last juror over here that procedure?

A Yes, I am sorry.

What I was saying was that this tube has a line which is exposed on the inside and the outside so that the line is touching this bit here on both pieces.

Now, I will put it in here again, and watch up at the top right here.

(The Witness turned on the generator.)

This is not part of the demonstration when I get shocked.

Look, see up there, and can you see,

the spark is jumping, and you have another spark gap, just like the spark plug in your car.

That is the end of this one.

Let me take this same National Catheter tubing, and I have one little thing that I would like to show you, and this is a claim of the patent, and that is the fact that the line is readily accessible, and it is on the outside of the tube. It is welded to it, but still it is accessible, and it can be peeled away to do what I did, right here.

Another thing that you can do is this: you can take your alligator clip, which is a common little clamp that they use in the electric business, and if you were to have to put this end of the tubing onto a plastic receptacle of some kind, a plastic top, and they make such things as that, and there was no way of grounding it, then you can take your bonding wire, and go to someplace where you can bond it like this. I can show you that there is an electrical pathway through that.

Now, you won't see any sparks except the ones that I am picking up at this wire here. It is hard to see. So you see what I have done is made the filament on the outside really available for bonding. That is that.

Q Go ahead.

A Now, there is one other thing. During my testimony, I made the statement that there was an inherent leak because parts of this Sherwood tubing, and this was due to the fact that the bulges were on the outside as well as the inside, and if in fact you try and put the two lines together, you compound that problem.

Q Are you through with the box?

A Yes.

MR. ARNES: May we have the lights turned on?

THE COURT: Yes.

(The lights were turned on in the Courtroom.)

THE WITNESS: Now, here is this, and in this package it is just the way it was delivered to the hospital. This is Sherwood tubing.

MR. ARNES: If you are going to poke a hole for your demonstration, I don't want you to use this.

MR. HENSLER: Will this valve poke any holes in this one?

THE WITNESS: Well, in this one.

MR. TUCKER: Maybe we can find you another one. I don't have any idea what you have in

that container, and I would like you to use another one.

MR. HENSLER: Do you object if we use another one?

THE WITNESS: If I can connect the two to the middle it is all right.

THE COURT: What is in that container?

THE WITNESS: This is Kool-aid.

THE COURT: I think that he should state for the record what he is going to do now so that the record will demonstrate what that is.

What do you intend to do, Mr. Jackson?

THE WITNESS: I am going to demonstrate the leaking problem with the Sherwood tube.

Now, I testified to that fact, and I would like to take two tubes out of a package and put them together and make a demonstration that shows that they do leak.

THE COURT: And you are going to insert this --

THE WITNESS: I will put them together just like so, and I will put the two lines together, just like they should be. And there you are.

THE COURT: And then you are going to insert this?

THE WITNESS: I will insert this into the Kool-aid, and we will hold this end, and then I will take this syringe.

Now, we are going to put that down into the Kool-aid. Now, what I am going to do, first, is blow some air down in there from this syringe, and then after I have done that, I am going to draw back in. We will relieve the pressure, and draw back to see if we draw any liquid into the tube.

THE COURT: All right.

(The witness performed the demonstration.)

THE WITNESS: Here we go.

It leaks!

Now, my plunger is down. Now, I am going to draw back, and keep that in the Kool-aid. There comes the Kool-aid.

And that concludes my demonstration.

Now, one other thing, let's do it with the National Catheter tube.

Now, this is what happens. The water is not leaking -- the water is not leaking out by gravity.

JUROR NO. 6: Was that a new tubing?

THE WITNESS: Yes, that was a new tube.

MR. TUCKER: May I see that?

THE WITNESS: Yes, but don't get that on your clothes (Offering).

Now, I would like to do that with the tube of ours. The only thing I would like to do -- we can crimp it off right there, and take this over there.

Now, before I do this, this is the way National Catheter joins its tube. It is completely conductive and this is conductive and here is the pathway, and here is your conductive male connector for the two tubes.

Now, we will put that in here, and that is the same.

I will do the same thing. Can everybody see?

Now, watch here. The tube that I put a needle hole through it, to hang it up.

MR. TUCKER: Your Honor, he was closer to it than I was, and I think he said, for the record, that it appeared to leak.

MR. ARNES: That has a needle hole in it.

Show them the needle hole. Your forgot that when you put that needle hole in it.

THE WITNESS: This is the needle hole, and I used that tube up there in the box. There is

the needle hole.

MR. TUCKER: May I ask why a needle hole was put in this?

MR. ARNES: To suspend it in the box that he used before, so he had a fastener, and so it would not slip down.

THE COURT: What happened, did that leak, too?

MR. HENSLER: Because of the needle hole which had been put in it in the previous experiment.

THE WITNESS: I happen to have a one hundred foot tube, and this is the way we package it. We put these things every six feet, and those conductive connectors, and we cut it in two with a pair of scissors and put the connectors between them.

BY MR. HENSLER:

Q What else is in the book?

A Each package is supplied with a supply of seventeen of these connectors so that they can do any kind of splicing that they would like. This is the way it could be spliced, if you wanted to join it and you take the scissors and cut a part like this (Indicating). Now, there is the two funnels, and I have cut it and there are the connectors.

Now, this tube is a little bigger, and

it will take a little more air.

Now, here is the syringe. Okay, all right. Now, I will push the plunger down. See, it is bouncing that back. That means that there is pressure within the tube, and you don't see any leaks.

Now, the other thing I did was to draw back on it and give a vacuum.

Now, I will take this out and push the plunger all of the way down.

Okay, you know when I pull on the syringe like this, that I put a vacuum in the tube, and if it is going to come in, you will see the Kool-aid come up into the tube.

See? This is a superior means of splicing two tubes.

Q Now, could you describe to the Court Reporter what just occurred?

A What I did was take two lengths of six millimeter National Catheter conductive tubing. I cut them in two and spliced them with the two conductive connectors and crimped one end and applied pressure to the other end, while the connecting joint was submerged. No bubbles were observed.

Then, I disconnected my syringe, and pushed the plunger to the bottom, and reinserted

it in the tube, and tried to withdraw it to form a vacuum on the tube. That is to draw the liquid into the tube, and no liquid appeared.

This concludes my demonstration.

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(p.1101 l.17 -- p.1104 l.20)

Q Now, did I understand your testimony during direct examination to be that a good indication of the energy involved, or a good rule of thumb is that a one inch spark creates a 50,000 volt shock?

A That is a rule of thumb.

Q And did we see a one inch --

A You saw more than one inches in some cases, where it was dangling and swinging there during the demonstration.

Q In certain circumstances more than 50,000 volts of electricity were generated in the spark that you showed to the jury this morning, is that correct?

A Yes.

Q Let me put this top back on.

Do I correctly assume, and make sure that I understand, that the purpose of this demonstration is to give this jury an idea of the hazards that we are dealing with in this case?

A Yes, that was my idea.

Q And it is a very serious hazard, isn't it?

A Yes, it is.

Q And if a spark should happen to take place where combustible gases are present in the operating room, what can happen?

A Well, there is a potential for explosion.

Q And certainly a spark that had a 50,000 volt?

A Any kind of a spark.

Q Well, any kind of a spark, sir?

A Yes.

Q And 50,000 volts is the figure that you used for a one inch spark, is that correct?

A Yes.

Q And what is the amount of voltage which would be involved in generating a half-inch spark?

A What did you say?

Q A half-inch spark?

A I don't know. I don't recall that off the top of my head.

Q Is it not a one to one relationship?

A I couldn't say.

Q It might or might not be?

A It might or it might not be.

Q Now, Mr. Jackson, do I correctly assume that this object, which was marked as Plaintiff's Exhibit sixty-one for identification, is not an object which one would expect to see in your everyday operating room?

A Definitely not.

Q And is it your testimony that the amount of voltage generated for purposes of our demonstration is to be considered as typical of the amount of voltage generated on a piece of plastic suction tube when someone handles it?

A No.

Q What is the relationship of that?

A I used this because this was the means that I had available to demonstrate.

Q It was a useful demonstration, wasn't it, sir?

A Yes.

A Q And you did not mean for the jury to believe that

sparks of that magnitude which we saw come off of this were the kind of things that we are concerned about in the operating room, sir, did you?

A Not necessarily.

Q Not necessarily?

A I don't know.

Q Not at all, isn't that right?

A Well, I wouldn't say that.

Q So, this might, as far as you know, give this jury some indication as to the degree of spark hazards -- let me finish my question -- this might, as far as you know, give this jury a fair indication of the degree of the spark hazard which one can expect to encounter handling suction tubing in the operating room, yes or no?

A No, it does not.

Q In fact, sir, if anybody brought this thing into an operating room, where flammable gases were present, they would probably throw them in jail, wouldn't they?

A Yes, they would.

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(p.1109 l.1 -- p.1109 l.5)

before. I ask that, let me ask you this: have you, in your laboratory tests which you have described for us, made any efforts to duplicate actual O.R. use of suction tubing?

A No, we haven't.

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(p.1130 l.10 -- p.1130 l.16)

Q And do I correctly assume that if a surgeon in surgery were to order his assistant to connect up the suction tubing and emerge it in the patient and then he were to blow on the tube to see what happened, that that would also qualify as a person who did an idiotic thing in an operating room?

A Yes, it would.

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(p.1132 l.17 -- p.1132 l.23)

Q Do I correctly assume, sir, that you left National -- that you left Sherwood about a week or two weeks after Mr. Sheridan left Sherwood?

A No, you are wrong.

Q About how much time?

A I worked two weeks, and gave a two weeks' notice, so it was approximately a month.

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Testimony of Stanley N. Garber
(p.1167 l.3 -- p.1170 l.3)

Q Now, Mr. Garber, on the third page of the patent there is a paragraph or a series of paragraphs entitled 'Background of the Invention,' correct?

A Yes.

Q And will you turn to the third paragraph, about the middle of the first column, and near the bottom we find a sentence that begins with 'In some cases' and may I point that out to you, sir (Indicating)?

A Yes.

Q All right. Now, that sentence says, does it not, that in some cases, the tube was provided with longitudinal strips or filaments having a thickness greater than the wall thickness of the tube, which resulted in a bulge in the inner and outer walls of the tube. Is that about right?

A Yes.

Q Now, Mr. Garber, that refers, does it not, to the Sherwood tubing that is manufactured under the Sheridan patent, does it not?

A I don't know if it specifically refers to that. It certainly could.

Q Do you know of any other conductive tubing which

has a conductive strip from the inner to the outer surface so that it could bulge as it has been described in the center, that I just read to you?

A Not on the inner and outer surface.

Q That is what it says, doesn't it; on the inner and outer walls?

A Yes.

Q Now, we are talking, then, about the Sherwood tubes, are we not?

A We are talking about the tubes like the Sherwood tubes.

Q Will you read very carefully and slowly the next two sentences following that?

THE COURT: I think that the jury, like I, am trying to find out where they are. Maybe you can locate this by how many lines down.

THE WITNESS: It begins at line thirty-nine.

THE COURT: I have that, but I don't know about the jury.

MR. ARNES: Maybe I can point this out.

BY MR. ARNES:

Q Now, Mr. Garber, would you read the next two sentences slowly please.

A 'When another device or tube with a strip was connected for fluid-tight and electrical connection, the engaged bulging strips tended to prevent a fluid-tight connection, and this tended to result in fluid leakage. Also, in such devices, when a stripe of one type was to be connected to the stripe of another tube, there was danger of less alignments of the stripes where they were to engage, and this prevented the danger of not obtaining electrical interconnection between the conductive stripes of the tubes.'

Q Now, that knowledge was known to Sherwood in April of 1974 or prior thereto, but at least April of 1974 when this patent application was made, was it not?

A I am not sure that I know what you mean by 'that knowledge'.

Q Pardon me?

A I am not sure that I know what you mean by 'that knowledge'. This statement was in the application and Sherwood or certain people certainly knew it was there.

Q And those sentences were constructed by people, either you or people on your staff, were they not?

A Yes, certainly.

Q And you were working for Sherwood at that time?

A Yes.

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(p.1177 l.22 -- p.1180 l.17)

Q And would you read, that, please, into the record?

A May I read the whole paragraph, since that starts in the middle of a sentence?

Q Be my guest.

A Again, had I read it previously I would not mind, but just so that I can understand this.

Q Read the whole thing.

A 'It is the objective of the present inventor to provide a plastic tubing having a conductive strip for preventing the accumulation of electricity to static charges thereon, which has connector means for connecting another member to the tube which has conductive material thereon. Wherein the connector means it is simply in conjunction, and used and provides reliable mechanical and electrical interconnection within the tube and member, and wherein the above mentioned undesirable features are substantially obviated.'

Q Now, Mr. Garber, the above-mentioned undesirable features are the leaking and the lack of the conductive connection in certain instances, are they not?

A Well, I don't know exactly. I would have to read all that was said previously. Do you want me to read the previous several paragraphs?

Q Just satisfy yourself enough that the previously mentioned undesirable features are the leaking, and the failure to have true conductive connection.

A Okay. I think that I am familiar enough with it

now to answer the question.

The preceding paragraphs talk about two different classes of undesirable features. One is what you mentioned. The second, in regard to the National Catheter type tube, and describing those undesirable features as requiring a special and relatively expensive connector or coupling element of metal or metal and plastic, and has been required to connect a tube in a fluid-type electrical connection with another device such as another conductive tube, and then that means the Jackson patent.

And now, this may be the same material, and it describes the end of the tube and --

Q What are you talking about now?

A Well, over here at the end and by fusing or cementing, and separate connectors and all of this increases the amount of materials and other manufacturing costs, and it increases the number of points of possible fluid leaks as well as increasing the number of electrical connections required.

Q All right.

A That describes the undesirable features over there associated with the National Catheter type

tubing, and the rest of the paragraph describes the undesirable features that you just mentioned.

Q That is the leaking and the failure to achieve a conductive connection?

A I have seen it leaking. I have not yet seen the other.

Q What was that?

A I said I have seen it leaking but I have not yet seen the electric connection. I can continue going over this and maybe I will find out about that.

Q I think it is in the last sentence of the prior paragraph.

A Yes.

Q It is the danger in not obtaining electrical interconnection between the conductive lines of the tubes, is that correct?

A Yes.

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(p.1196 l.19 -- p.1198 l.23)

Q Mr. Garber, referring again to the deposition which you gave, on January 7th, 1976, and to page twenty-seven and page twenty-eight thereof, may I ask you if this question was, or these questions were asked, and these answers were given by you:

'Question: Is it fair to say that in paragraph five(b), Mr. Woolman was seeking to

achieve, and by Mr. Woolman, of course, I include all of Sherwood, was seeking to achieve protection with respect to extra tubing and conductive line tubing which was broader than afforded by the extra and clear conductive patent which had been licensed to Brunswick?'

'Answer: Yes, if not there would be no need to include this paragraph.'

Did you give that answer, sir?

A Absolutely; absolutely.

Q And is it true? Is it true?

A No, if I may explain, I will.

Q You may in a moment. Is it your testimony before these Ladies and Gentlemen of the jury that when you gave this deposition on January 7th, 1976, you gave a false answer?

A I did not intentionally give a false answer. I think that the answer that I gave was somewhat misleading, but not intentionally.

Q Did you, Mr. Garber, after giving this deposition, appear before a Notary Public and sign it?

A Yes, I did -- well, no, I think that we waived the signature.

Q Did you read it?

A Not on the --

Q Did you read it before you got on the witness stand in some court?

A Yes, before I got on the witness stand I sure did.

Q And when you read it and found an answer like this, did you make an effort, through your Counsel, to correct it?

A No, because it was corrected in a subsequent answer in the same deposition.

Q Mr. Garber, you contended in your deposition, at page sixty-seven and sixty-eight, that the license agreement which involved the patent, and the settlement agreement, were two entirely different and separate things, did you not?

A Yes, they were separate parts of the settlement agreement.

Q And is that the basis in which you said that you corrected the answer that we just discussed?

A Yes, I think that the answer was that when Mr. Woolman was trying to acquire these rights in a settlement agreement, in paragraph five(b), he did not consider the patent at all. He was strictly interested in attempting to preserve those aspects of Mr. Sheridan's business that he purchased originally.

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Q Now, Mr. Garber, Sherwood knew on April 17th, 1974 that the deficiencies in the tubing was that under some conditions it leaked, and that under some sections it wasn't conductive, did it not?

A That is what that document says.

Q That is a Sherwood document, isn't it?

A It is a patent issued to Sherwood.

Q It is prepared by Sherwood lawyers, and submitted in good faith to the Patent Office of the United States Government, is it not?

A Well, absolutely.

Q And on the basis of which a patent was issued?

A Certainly.

Q Now, Mr. Garber, despite that knowledge, Sherwood did not tell its salesmen, did it?

A Sherwood -- no, I don't suppose it told its salesmen, based on that knowledge.

Q And it did not come out with any publications to warn its customers, did it?

A No, we have never received complaints from the field regarding this.

Q You didn't? And it did not tell Ms. Rogers, and the operating room advisors or supervisors who are in command and have the duties of caring for the health and lives of their patients, did they?

A Ms. Rogers testified that she was very experienced

and performed thousands of operations and never experienced those problems.

Q And she also testified that your salesman, Sherwood's salesman told her that you did not have to line up the connective lines?

A Which she had never done, and never experienced a problem, she testified.

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(p.1212 l.14 -- p.1222 l.19)

Q You had testified that you did not tell Ms. Rogers about the contents of that so-called Berliner patent, and do you have it as an Exhibit number, sir?

A No, I don't. It is not marked on my copy.

MR. TUCKER: Could you tell us the Exhibit number?

MR. ARNES: That is Exhibit B(r).

THE COURT: That is Exhibit B(r), right.

BY MR. TUCKER:

Q Do you recall my question, sir? You testified that you did not tell her about what is in that Berliner patent, is that right?

A Yes.
Q And why didn't you?
A I didn't recall that we even had the patent. We have an awful lot of patents. Sherwood was in the neighborhood of 100 or 150 patents, and I only tried to know those patents that cover products that we are using, and that is the most important patents of the company.
Q Now, Mr. Arnes said, isn't it a fact, that under certain conditions the Sherwood tubing leaks, and do you recall that?
A Yes, I do.
Q And isn't it a fact that that is recited in the bottom one of the Berliner patent, and do you recall that?
A Yes.
Q And have we seen an Exhibit of Sherwood tubing leaking today?
A In the previous demonstration, yes.
Q And Mr. Arnes testified that under certain circumstances -- Mr. Arnes asked you to testify that under certain circumstances the Sherwood tubing was non-conductive, and do you recall that, sir?
A Yes.
Q And if you don't line the items up together, you lose conductivity, is that correct?

A That is correct.

Q And nave you seen an example of the circumstances under which the lack of conductivity can be demonstrated to hospital personnel?

A In Mr. Jackson's demonstration, yes.

Q And putting 50,000 volts on the tubing, and putting it in the black box to make a big spark, is that what you are referring to?

A Yes.

Q And the patent was applied for in April of 1974, or thereabouts, is that correct, sir?

A Yes.

Q And as of April of 1974, were American Hospital Supply salesmen in the field marketing the National Catheter product?

A I believe that they were just in the beginning of the process. Yes, I think that they were.

Q And directing your attention to Defendant Exhibit A(h) for identification, and which may be in front of you, Mr. Garber?

A Did you say A(h)?

MR. TUCKER: May I have that, Mr. Arnes?

MR. ARNES: Yes (Offering).

BY MR. TUCKER:

Q Look again at Defendant's Exhibit A(h) which, if I

may state for the jury's benefit is a sales report for the week end of June 30th, 1973 by Mr. Beecham, and may I ask whether that refreshes your recollection as to whether the American Hospital Supply marketing people were in the field selling the National Catheter product over the Sherwood product as of the date that the patent application was filed?

A Yes.

Q And in fact, they have been in the field for several months,have they not?

A Yes, in June of 1973, and they were in the field then.

Q And for several months was the American Hospital Supply salesman arguing to the hospitals, as a way of getting the hospitals to switch over from the Sherwood tubing to the American Hospital Supply product --

A They were arguing that our tubing leaked, and that our tube wasn't electrically conductive.

Q And I take it that you don't know whether they actually did the demonstration and blowing the bubbles in the water?

A No, but I have been told that they did do the syringe and pumped it full of air.

Q And I take it that you don't know whether or not someone brought in this equipment to the operating

room to do that, and show that it would be possible to generate a spark on this tubing if the lines did not hook up?

A No.

Q And as of the time that this patent application was filed, you testified that, or you admitted that under certain conditions the tubing had to be lined up, and a leak could be made to appear in the bubble, and that goes back to what is recited in this patent, and is that fair, sir?

A Yes.

Q And under what circumstances of actual O.R. use would the tubing leak, or would the lines have to be lined up?

A None that I know of to my knowledge.

Q And to what extent had users in the field complained to Sherwood that the tubing wasn't suctioning properly because of leakage?

A None, or substantially none, to my knowledge.

Q And to what extent had users in the field, to your knwoledge, complained to Sherwood that the tubing had to be lined up, black line to black line, in order to make it work right?

A None.

Q And why had Sherwood not undertaken to make any changes

in the configuration of the conductive suctioning tubing prior to the present time?

A Because we felt that our product is a superior product.

Q And to what extent was that belief of yours justified by complaints from the field?

A It was substantiated.

Q Of course, I gather American Hospital Supply salesmen might have gone and talked to people like Mr. Ayer, is that correct?

A Oh, sure.

Q And you have correctly testified that the hazard in the operating room is not setting the drapes on fire, and do you agree with that?

A Yes.

Q Because if you set the drapes on fire that means setting the patient on fire, and would you agree with that?

A Yes.

Q And did you hear Mr. Ayer testify that even if there was no flammable anesthetic in the operating room, that the conductive tubing might set the drapes on fire?

A Yes.

Q And might a person like Mr. Ayer believe representations from an American Hospital Supply salesman when he was

in and said, 'Look how the tubing can be made to leak,' and then submerging the tubing into a bottle of Kool-aid and blowing into it?

A Yes.

Q Now, let me direct your attention back to the patent application which states, and by the patent application, I refer to the Berliner application, which Mr. Arnes has circulated for the Ladies and Gentlemen of the jury, and the patent application does state, does it not, that this invention that we are talking about relates to plastic tubing, and to medical and surgical tubing such as catheters, suction tubes, and again, for the benefit of the jury, I am reading from column one, and do you have that? That is column one on the third page?

THE COURT: And what is that?

MR. TUCKER: That is the Berliner patent, and it is Defendant's B(r).

THE COURT: May I see that?

THE CLERK: Yes (Offering).

BY MR. TUCKER:

Q Let me again go back, Mr. Garber, and read that the plastic tubing has been made with conductive plastic stripes or filaments -- no, that is not it.

I meant to read from the sentence,

that is the third sentence in that paragraph and it says that medical and surgical tubes, such as catheters, suction tubing, oxygen, and anesthesia adminstration tubings and the like, are used in hospitals where combustible atmopheric conditions often occur, and there is a U.S. Patent number, and then there is a second number after that concerning the method for preventing ele ctrostatic spark discharge.

Well, my question, Mr. Garber is: do you know what two patents are being referred to in that column?

A Yes.

Q And which ones are they?

A 5870132 is the original Sheridan patent that is now directed to Sherwood's conductive tubing.

Q That is Mr. David Sheridan's patent on the Argyle tubing, which is the subject of this litigation, is that right?

A Yes.

Q And what does the other patent refer to?

A The Jackson patent.

Q And if an attorney in your office were sitting down to prepare a patent application describing the background of an invention in connection with the patent that has been laid before the jury, what

language would he have available to refer to in the Isaac Jackson patent, Defendant Exhibit B(g), in order to describe the background of the invention to the patent examiner.

A He would have the background of the invention portion of the Jackson patent.

Q And what language would he read?

A The same language.

Q And that is out of the Jackson patent?

A Yes.

Q Let me direct your attention to column one under the background of the invention, and I believe that you have the language there?

A Yes.

Q So that if an attorney in your office had only the application, the patent application on the other Jackson patent to work from, and if he set down to use that application, what is the attorney in your office likely to have told the patent examiner?

A I am sure that he told him the same thing that the Jackson patent stated.

Q And if the Jackson patent stated the facts incorrectly, what effect did that have on the patent application which we have just been talking about?

A It would have a similar effect.

Q The facts would be incorrect, is that right?

A Yes.

Q And what about poor Mr. Askin who has never been able to come to this court and testify: what effect would that have had on Mr. Askin?

A He would have been led to believe that those, in fact, were the true facts.

Q Particularly if he had no experience in the medical section, isn't that correct?

A Yes.

Q And since Mr. Askin had seen it written to him twice that those were true facts, he would probably be thoroughly persuaded by the time this other patent was submitted that those were indeed the true facts, and he would agree?

A Yes.

Q And he would have been completely wrong, wouldn't he?

A Yes, he would.

Q Now, Mr. Garber, you testified that it is common for attorneys to make claims with respect to their client's inventions in the patent application so as to be as broad as possible, and is that a fair statement of your prior testimony?

A That was a fair statement to the question asked, I think.

Q So I correctly assume that it is not a practice to intentionally make misleading claims?
A Absolutely.
Q And did you hear me ask Mr. Palmer if he really intentionally made any misleading statements?
A Yes.
Q And didn't he say that he didn't?
A Yes.
Q And if statements are made that are misleading, but nonetheless unintentional, what, if any effect, would such unintentionally misleading statements have upon the information submitted to the patent examiner?
A Again, the patent examiner could be mislead, whether they are intentional or not, into granting a patent which maybe he should not have.
Q And what would that effect be if the patent was litigated subsequently?
A If the patent was subsequently litigated that effect would render the patent invalid.

***

Q What does the Berliner application describe as the problems associated with other types of tubing? Not just ours, but anybody's.

A It describes several problems. The first is that on some types of tubing, relatively expensive connections or coupling of the metal and plastic are required to connect a tube in fluid-type connection. It is further indicated that the patent increases the amount of material and other manufacturer's costs associated with this type of tube, increases the number of points of possible fluid leaks, as well as increases the number of electrical connections required.

Q Now, what kind of tubing does that language refer to?

A The National Catheter tube.

Q Or the so-called Davol tube?

A Or the so-called Davol tube.

Q Or the so-called Bard tubing?

A Yes.

Q Now, continue, please, and explain the problems to the jury, and tell the jury whether any problems set forth in that column one referred to our tubing, the Sherwood tubing.

A Yes, the same paragraph goes on to state that --

THE COURT: Tell the jury what you are reading from. That is the third paragraph. Tell

them the lines. They can follow the lines.

A This is the third paragraph just prior to the summary of present invention.

Q Is there a line referenced in this column, sir?

A Yes, starting at about line 39, I guess it describes --

Q In some cases?

A Yes, in some cases, that portion of the patent starting there describes those problems, alleged problems associated with the Sherwood type tubing.

Q And describe them, please.

A In some cases, the tubing was provided with longitudinally conductive stripes --

Q A little slower.

A I'm sorry. In some cases, the tubing was provided with longitudinally conductive stripes or filaments having a thickness greater than the wall thickness of the tube which resulted in a bulging of the inner or outer walls of the tube. When another device on the tube with a stripe was connectedfor fluid-tight and electrical connection, the engaged bulging stripes tended to prevent a fluid-tight connection, and this tends to result in fluid leaking. That is the first problem. Also in such devices where a stripe of one tube was to be connected to the stripe of another tube, there was danger of misalignment of the stripes where they were to engage, and this presented the danger of not

obtaining electrical interconnection between the conductive stripes of the tubes.

Q And those tubes that you have described pertain to the Sherwood type tubing, is that correct?

A Yes.

Q And were those real problems?

A Certainly.

Q Will you explain to the jury in what sense those were real problems?

A They were real problems in the sense that allegations by American Hospital Supply salesmen in the field to hospital personnel and purchasing people were being made regarding our tubing, that our tubing leaked and that our tubing did not present a good electrical connection between two tubes. It was a real problem in the sense that we were losing business because of these allegations.

Q And to your knowledge, were certain demonstrations or displays used by American Hospital in the field?

A Yes, there were. American Hospital salesmen were using the syringe demonstration similar to what Mr. Jackson did yesterday in Court to pressurize the tube and attempt to influence customers into believing that our tube would leak when it is used for its normal purpose. I don't know that they carry around

Vandegraff generators with them.

Q Who, sir?

A Vandegraff generators.

Q That is Exhibit 61?

A Yes. I don't know if they carry those things around with them to hospitals, but I do know that they made allegations that our tube did not provide a continuous conductive line unless the two lines were aligned when joining tubes.

Q Now, what was the result of such statements being made by American Hospital Supply in the field?

A Well, the result was, we were again losing business because of the statements, and there was concern within the company to do something about it.

Q Now, to what extent were the problems which you have just described for the jury on the Sherwood tubing confirmed by actual experience in operating room use of that tube, sir?

MR. ARNESS: I object unless he knows from his own personal experience what the operating room use was. He told me yesterday he wasn't familiar with the operating room procedure.

MR. TUCKER: He can certainly report on complaints made to him.

THE COURT: Read the question again.

(The pending question was read back by the Reporter.)

THE COURT: What is your objection, sir?

MR. ARNESS: He is not in a position to say what was confirmed in operating room use. He is not experienced, and he told us yesterday he didn't know anything about operating room use.

THE COURT: I will ask him.

Did you have any experience, actual operating room experience?

THE WITNESS: I have never been in an operating room. I know how our products are used in an operating room, and in addition, product complaints are all called to my attention. Product liability suits involving our products are all handled in my department by me, so I am familiar with the complaints that come from the field regarding our products.

THE COURT: What complaints come in about leakage and --

THE WITNESS: Substantially, none.

THE COURT: To you?

THE WITNESS: None to anyone. As regards to the electrical connection problem, to my

knowledge, we have never received a complaint, and we have sold millions of dollars worth of this product over the years and millions of feet of this tubing over the years. I don't think we have ever -- we have never, to my knowledge, received a single complaint on electrical interconnection. If we have received any complaints on leakage, they have been very, very minimal. I don't know of any, to my knowledge. Specifically regarding leakage, we may have received several, but over the years, after you sell millions of dollars worth of products and millions of feet worth of products, you always receive some complaint from some person.

THE COURT: You said you were concerned. Now, what was the basis of that concern about the leakage and not continuous conductive problems?

THE WITNESS: The basis of concern was that even though these were not real problems experienced in the operating room, people like Mr. Ayres who showed these demonstrations which do not represent actual operating room use of tubing, would nonetheless be convinced that they were problems and would buy their products rather than ours. That concerned us.

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Testimony of Frederick Grossman
(p.1396 l.7 -- p.1396 l.25)

"Q Do you know when it was that American Hospital Supply decided to market the Sheridan tubing? And by Sheridan tubing, I refer to tubing similar to that which you produced today and similar to your Exhibit 6.

A Sometime prior to the phone calls from Willman, late -- was it '71 or early '72?

Q You did not defer decision until after June 22, 1972, is that correct?

A We did defer.

Q You did defer?

A Yes, we did defer final decision.

Q I am speaking of the day of the final decision, to the best of your recollection.

A The final go ahead was upon sometime after receipt of that letter and prior phone call about the mentioned testimony here with Mr. Hull.

Q That would have been sometime in the summer of 1972, is that correct?

A Correct.

***

Transcript of April 14, 1976
Henry B. Franey, Jr.
(p.1464 l.8 -- p.1465 l.6)

Q. In April of 1972, did you have a conversation with anyone in American Hospital Supply with respect to the subject of those two documents?

A. I don't believe I did in April.

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Q. When do you believe that you did have such a conversation?

A. It would have to be either right at the end of April or early part of May.

Q. Of '72?

A. Yes.

Q. With whom did you have that conversation?

A. Fred Grossman.

Q. Where did the conversation take place?

A. In Fred's office in McCall Park.

Q. Was anyone present besides Mr. Grossman and yourself?

A. I don't recall.

Q. Please state your best recollection of what you said and what Mr. Grossman said at that time?

A. As I recall it, Fred called me down to the office, and at the time we were working on the advertising, the other things we were doing to introduce the product line, and he indicated we were on indefinite hold based on some potential legal considerations between National Catheter and Sherwood.

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(p.1471 l.18 -- p.1471 l.20)

"Q. Let me direct your attention to a handwritten notation on Defendant's Exhibit BY which states, 4/28/72, 9:15. Hold this P.O. B. Franey."

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(p.1476 l.1 -- p.1476 l.4)

Q. Did Mr. Grossman respond to your inquiry?

A. Yes, he wrote across the top of the memo, received O.K. from Dick Hull. Go ahead, something to that effect."

***

(p.1479 l.9 -- p.1480 l.7)

seems to state '5/11/72, okay, full speed ahead.' Do you see that, sir?

A. Yes."

THE COURT: What page is that?

MR. HENSLER: Your Honor, we started on page 38 and we moved over to the top of 39.

THE COURT: All right.

MR. HENSLER: Moving further down on the page:

"Q. You understand, that I am not asking you to agree or disagree with anything that is on the piece of paper before you?

A. Correct.

Q. I am asking you if that refreshes your recollection as to a conversation in May of 1972, about May 11th, 1972, between yourself and anyone from National Catheter?

A. Correct.

Q. What is your recollection of that conversation?

A. After talking to Fred, and getting the information that is described in this Ross Sheridan Exhibit 5, I called National Catheter, gave them the go ahead.

Q. That was in May of '72?

A. Yes.

***

(p.1481 l.25 -- p.1482 l.11)

"Q. And I now direct your attention to the handwritten notation that says, Okay, end of June, on Defendant's BY. Do you recall what if anything you said about the end of June at the conversation of May 11th, 1972?

A. My calling National Catheter at the end of June I think relates to the memo I had sent Fred asking for an update when he wrote back to me across the memo saying okay to go ahead.

Q. So you called National Catheter on about May 11th and told them to go ahead full speed, and then called them again at the end of June, is that correct?

A. Correct.

***

(p.1486 l.7 -- p.1488 l.6)

Q. What accounted for the delay between June of 1972 and your input into the computer in December of 1972?

A. Just the fact, to the best of my memory, we did not want to go ahead and sell the product because Sheridan still had legal problems with Sherwood.

Q. You said to the best of your memory. Is that based on any conversations which you had in American Hospital Supply?

A. It is based on reviewing the correspondence and the fact that from the period, roughly, the period June through the balance of 1972, there wasn't anything else holding us back from selling the product. We had finished packaging, we had finished the specs on the product. We were ready to go.

Q. Who actually made the decision to give the computer the instructions which it needed to get an order to direct Sheridan to ship?

A. Fred Grossman would have had to give me the okay to go ahead and put it through.

Q. Do you in fact remember him giving you that okay?

A. I don't recall him specifically doing it.

Q. You would not have taken it upon yourself to decide, after the passage of time, that American Hospital would handle Dave Sheridan's material even though it was having legal problems with Sherwood, is that correct?

A. Correct.

Q. And you would have had to get that instruction from somewhere?

A. Correct.

Q. After you told either Dave or Ross Sheridan and National Catheter to proceed with the production in May of 1972, did you continue to have contact with people at National Catheter Corporation?

A. Correct.

Q. Typically, Ross Sheridan?

A. It would have been Ross for inventory. It would have been Dave for new products.

Q. And did you continue to have contact with Ross Sheridan with respect to the clear conductive tubing which is the subject of this litigation?

A. I would assume that I did.

Q. When you say you would assume, you don't recall?

A. I don't recall that I specifically did.

Q. So that the last contact that you can recall with Ross Sheridan with respect to the clear conductive tubing which is the subject of this lawsuit, is this phone conversation in which you said, go ahead full speed, is that correct?

A. Correct.

***

(p.1498 l.3 -- p.1498 l.17)

A. Let me put it this way: We had no intention of distributing that product if we felt there was a liability to our company as a result of the litigation between Sherwood and National Catheter.

Q. And on June 26, Mr. Hull said, 'Okay to proceed.'

A. Correct.

Q. Did he not?

A. Correct.

Q. Who at American Hospital Supply was responsible for determining whether or not there was a potential liability to American Hospital Supply?

A. It would rest on Mr. Hull.

Q. The same man who said, 'Okay to proceed,' don't you

agree?

A. Yes.

***

(p.1513 l.12 -- p. 1514 l.3)

Q. Let me direct your attention to the first paragraph of Exhibit 21 in which it is stated that, as you all know, we had to recall the 18194 series of the 100 foot coils, and this delayed the introduction of the entire line. Do you recall that incident?

A. Yes.

Q. What are the or, what were the 18194 series of 100 foot coils?

A. The 18194 series is a non-sterile coil of conductive tubing.

Q. Such as that displayed on American Hospital Exhibit 7B?

A. Correct.

Q. Why did that have to be recalled?

A. After the product had been shipped and some inventory had been sent out to our customers from our distribution center, we discovered that the connectors were improperly cemented and the tubing leaked."

***

(p.1517 l.6 -- p.1517 l.14)

Q. When did the leaking first come to your attention?

A. I believe it came to the attention, to my attention through our Kansas City office. Our manager called and said that the damn stuff leaks, or something like that, and that is when we started checking on it.

226 We had all our inventory checked all around the country.

Q. That would be some time after December 28th, 1972?

A. Correct.

***

(p.1519 l.17 -- p.1520 l.2)

"Q. Were you aware of any significant difference between the National Catheter conductive line tubing and the Argyle conductive line tubing?

A. Yes.

Q. Could you list the differences of which you are personally aware?

A. The major thrust of our sales effort was based on the positive seal of the connector and also the fact that the connectors are 100 per cent conductive on a 360 degree plane and those were our two main selling features."

***

(p.1520 l.7 -- p.1524 l.25)

"Q. When was the first time that you were informed that you would be called to testify as a witness in this case, Mr. Franey?

A. Dick Hull called me last week.

Q. About a week ago, is that correct?

A. Yes.

Q. Prior to Mr. Hull's call of about a week ago, when did you first have occasion to give consideration to the reasons behind the delay of American Hospital Supply's entry into the market with respect to the clear conductive tubing.

A. Well, if you back up to the time I was a product manager, I was aware of the reasons for the delay at that time.

Q. You have testified that there were letters written by Mr. Willman that you were aware of, and that American Hospital Supply's concern over legal entanglements caused the delay.

A. Correct.

Q. That has been established

A. Correct.

Q. And you have testified that Mr. Richard Hull gave American Hospital Supply the okay on June 26, 1972, is that correct?

A. I testified I got it from Fred Grossman who got it from Mr. Dick Hull, correct.

Q. Do you know of anything that happened after June 26, 1972 that had anything whatsoever to do with the possibility of legal action between American Hospital Supply and any of the manufacturers of clear conductive tubing?

A. I cannot honestly recall specifics, which I have testified to.

Q. You have indeed. I'm curious to know the basis of your statement that it was your understanding that the American line of clear conductive tubing was not introduced until the first quarter of 1973, some seven or eight months later, as a result of the possibility of legal action with respect to American Hospital Supply. Did you not just testify under examination by Mr. Hensler that it was your understanding that the legal action brought about that delay of those many months?

A. I did testify to that.

Q. What is the basis for that understanding?

A. My basis is, and referring to the time frame of June 26 on, I had no knowledge of anything else that caused the delay. From the product manager point of view, I was not aware of any production problems. I was not aware of any packaging problems. I was not aware of the fact that there were any other considerations that would prevent us from going to the market. We were ready to go to the market.

Q. So that it is a process of elimination which enables you to testify that it is your understanding that the delay had impact beyond Mr. Hull's giving the okay to proceed in June, 1972, is that fair?

A. Based on my memory, I would say that is fair.

Q. Do you have any recollection as to whether, in your conversation with David Sheridan or Mr. Ross Sheridan subsequent to June of 1972, you kept aware of the state of completion by National Catheter with respect to the two purchase orders that we discussed?

A. From time to time I believe I was kept abreast of that, that's correct.

Q. Are you in a position to state that National Catheter had completed preparation of all tubing called for by those purchase orders in time to be on the market shortly after June 26, 1972?

A. Based on what I have seen here, I can't say that.
Q. You can't say that, can you, sir?
A. No.
Q. It is possible then that one reason for the delay is that National Catheter did not complete production of all of the products until as late as November of 1972?
A. It is possible."

MR. HENSLER: Turning over to pay 125:

"Q. With respect to the vacuum test that you described that you conducted, how long did it take you to run that test.
A. A minute or two.
Q. You had available a piece of bubble tubing of Argyle type similar to that which I am holding in my hand?
A. Yes.
Q. And you took a knife, did you, and sliced the tubing at the funnel?
A. I cut it at various diameters in the tubing to get the tightest possible seal I could.
Q. And then you applied a syringe and withdrew on the plunger, is that correct?
A. Yes.
Q. And if there had been a vacuum, what would you have expected to see?

A. Let the plunger go and it would snap back in.
Q. That is a standard for vacuum, in your business?
A. The reason for that is -- this is not a standard test. The reason for that is, it is a demonstration that can be used in front of a customer.
Q. It is a marketing test?
A. Yes.
Q. Is one of the uses that this clear conductive tubing is marketed for is to accept a plunge from a syringe to see whether or not the plunger will snap back?
A. No.
Q. It is used for suctioning, is that correct?
A. Yes.
Q. What happens with respect to lengths of clear conductive tubing if, during suction, the vacuum or seal becomes less than perfect?
A. You have got the possibility of fluid build up in a wound.
Q. It stops suctioning?
A. Yes, and you know, it clouds the operative site.
Q. Have you ever heard of such an incident actually happening in the field?
A. Yes.
Q. With respect to the Argyle bubble tubing?
A. No.

(p.1525 l.17 -- p.1526 l.10)

Q. Have you observed the operation of Argyle tubing with connection to a vacuum machine?

A. Yes.

Q. What did you observe with respect to the operation of Argyle conductive line tubing in that case?"

MR. Hensler: Skipping down the question is:

"Q. Would you explain to Mr. Tucker what a vacuum machine is?

A. It is not a machine, it is a plastic suction bottle. It takes the place of glass. It fits on a suction machine."

MR. HENSLER: Skipping over to the answer on 129:

"A. The answer to the question is --"

MR. TUCKER: I'm sorry, I did not hear the question.

"A. The answer to your question is, the product worked fine."

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Testimony of Ross Sheridan
(p.1624 l.4 -- p.1629 l.12)

THE WITNESS: Your Honor, excuse me. If I may, the first note in sequence would have been the one dated 4/28/72 which says, Hold up P.O. per Bart Franey. The second notation would have been 5/11/72 which says, "Go full speed ahead per Bart Franey." And a third note says, "Okay, go ahead, per Bart, end of June." So it would have happened in that sequence.

THE COURT: I know the sequence, but when you got that call and you made the noting, did you go ahead then in production?

THE WITNESS: No, we did not.

THE COURT: Well, what was the reason?

THE WITNESS: The reason was that we still had $20,000 worth of clear conductive tubing which we had made from the first purchase order which was still sitting in our warehouse, and they had not given us any orders or any locations to ship this material. We couldn't see any reason for making additional clear conductive tubing when we already had $20,000 of it sitting in our warehouse from the first purchase order.

THE COURT: You had an order for 60,000?

THE WITNESS: That is correct, the second.

THE COURT: Did you start to make the 40,000? You had 20,000?

THE WITNESS: Correct, we had 20,000 completed from the first purchase order.

THE COURT: Did you call back Franey or--

THE WITNESS: There were requests from Bart Franey to give us shipping locations for that order, but they had not, and consequently, we could see no reason to make additional tubing when we already had their first order completed which had been sitting in our warehouse for about a month and a half.

THE COURT: Well that was your decision?

THE WITNESS: Correct.

THE COURT: All right.

BY MR. LIVINGSTON:

Q. Let me see if I correctly understand. American Hospital Supply told National Catheter to go ahead with production under the purchase order in June 1972, is that correct?

A. Correct.

Q. But National Catheter did not go ahead with production because it chose not to do is, is that correct?

A. Correct.

Q. You have testified that you requested of Mr. Bart Franey directions for shipping, is that correct?

A. Correct.

Q. Is this evidenced in any writing?

A. I don't know of any readily available. This is something that would have happened during a normal conversation with Bart Franey.

Q. Are you speculating or do you know of such requests for shipping authorizations?

A. I cannot prove it because I just mentioned it, I do not have anything in writing or readily available.

Q. Let's take a look at the bottom have of this purchase order. There is a number of items. Do you see that, sir?

A. Which one are you referring to, counselor?

Q. I am referring to a number of items with the costs at the end. Is it fair to say that this -- would you explain what we see on the bottom half of that page?

A. I would like you to explain it to me what you are referring to, counselor.

Q. Okay. Do you see where it says "Order dated April 18th, 1972"?

A. Yes.

Q. And then there are a number of columns, is that not correct?

A. Correct.

Q. And there are numbers and words appearing in the columns,

is that correct?

A. There are numbers and abbreviations.

Q. Could you explain what all this means to us?

A. Specifically, which one?

Q. Well, let's take the first item going from left to right.

THE COURT: Point it out to him. He doesn't seem to know.

A. I have already read this first in my testimony for you previously.

Q. Okay. Is it fair to say that what this represents is an order for specific quantities of various items of clear conductive tubing, is that fair?

A. Yes, it is, it is a purchase order.

Q. From looking at that document, can you tell me when production of item number 1 was completed?

A. 8/24/72.

Q. How can you tell that?

A. Because there is a notation to the left of the first line.

Q. Is that your handwriting?

A. Yes, it is.

Q. You are referring to 8/24?

A. Yes, I am.

Q. When was the second item completed, can you tell from looking at that?

A. Yes, I can. 11/18/72.

Q. And that is also in your handwriting?

A. Yes, it is.

Q. When was the third item completed?

A. 11/10/72, which is in my handwriting also.

Q. When was the fourth item completed?

A. Would you like me to read the balance of them, counselor? It is very clear what we are looking at here.

Q. These are completion dates of production.

A. That's correct.

Q. So in fact, National Catheter did go ahead and produce the clear conductive tubing called for by this purchase order.

A. Correct.

Q. And when was all the clear conductive tubing called for by this purchase order complete?

A. December 18th, 1972.

Q. And that is about 5-1/2 months from the end of June, is that not correct?

A. Correct.

Q. And it was at the end of June that Bart Franey told National Catheter to go ahead with production and the purchase order?

A. Correct.

Q. And is it not correct that 5 months elapsed between the

receipt of the first purchase order and the completion of the clear conductive tubing called for by that order?

A. Referring back to the purchase order now, the other exhibit?

Q. Yes, sir.

A. That is correct.

Q. So that if it took you five months from April 18th, 1972 to complete production of the purchase order, you would have completed some time in late September, the first part of October, is that correct?

A. If it took five months and we started immediately upon receipt of the purchase order, that is correct.

Transcript of April 15, 1976
Testimony of David Sheridan
(p.1652 l.14 -- p.1652 l.15)

Q. What is your present age?

A. I will be 68 in July.

(p.1653 l.1 -- p.1653 l.10)

Q. Mr. Sheridan, what is your occupation?

A. I am president of National Catheter Corporation.

Q. And in that capacity, what is your job?

A. My job is to make sure the plant operates efficiently. And in fact, I am in charge of the whole operation.

Q. What is the business of National Catheter Corporation, what does it do?

A. It is the manufacturer of catheters and surgical tubes.

Q. For how long a time have you been in that business?

A. I have been in this business since 1939.

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(p.1654 l.3 -- p.1656 l.4)

but I liked the idea of living in the country, so I bought the farm where I am presently, in Argyle, New York.

Q. How many acres is that?

A. That is a 120 acre farm.

Q. Go ahead, sir, what did you do then?

A. Well, when we bought the place, the house was an old house, and all it had was an outhouse in back and a pump out in front. I spent about a year and a half to two years modernizing the house, doing a lot of the work myself. And from there we went out to the cow barn and tore out all the horse stalls and cow stalls and made it into a manufacturing plant. We put in concrete floors, new walls, insulation, heat, power, water and whatever. Then I started to -- well, I will back up a little bit. While I was with the United States Catheter and Instrument Corporation, we made catheters by another process. Basically, we had to braid a tube similar to the way shoelaces have been made, and then we had to impregnate them and we had to coat them with about ten to fifteen coats of a varnish, and then bake each coat, grind and polish, and then finish coat them. It was a very tedious and

expensive process. I always had an idea in my mind that catheters could be made better and cheaper, so when I went to the barn in Argyle, I had this idea in mind, so I started to experiment, and after several months of experimentation with a certain process which they call a dipping process, I decided that wasn't the way to make catheters. And then I heard about an extrusion process or extrusion machine, so I thought that possibly that might be the way to make a catheter. So finally I was able to buy an extrusion machine, and it was difficult because the area where we were only had single phase current, and you couldn't run a motor any larger than what we call a 3 h.p. motor, so all extrusion machines were always manufactured with three phase current.So I was finally able to get a manufacturer of extrusion machines to build me a machine that had a single phase drive on it. After we received the machine, I started to learn how to operate the thing. In fact, we went even to the point of developing or manufacturing our own compounds. And after a period of about six months experimenting with the machine, we developed all the processes that evolve the present line of catheters that Sherwood Medical, or most of them Sherwood Medical is making today. We developed the bubble making process, we

developed the X-ray line, we developed the method of forming the ends and the eyes and tips of all the catheters, and everything associated with making disposable plastic catheters.

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(p.1661 l.11 -- p.1663 l.20)

Q. After the contract, did you in fact become president?

A. Oh, yes.

Q. Now, will you tell us briefly what the history of your relationship with Brunswick was after February 1960?

A. Well, after I sold, we started to operate. Everything was okay. And I was head of the corporation. I ran the operation for them.

Q. I remember what I wanted to ask you before, Mr. Sheridan. Was it important for you to be head of the corporation?

A. Yes, it was.

Q. Will you tell us why?

A. Because I felt that there were very few people in this country that knew how to manufacture catheters. It really wasn't a science, it was an art, and I just felt if anyone else stepped in there and tried to run

the corporation, I didn't think they would get very far. And I was always very interested in the quality of the products that we put out, and I wanted to make sure that the thing would be run properly, and I wanted to be head of the corporation.

Q. Now, Mr. Sheridan, will you tell us briefly of the nature, or the history of your relationship with Brunswick?

A. Well, as I mentioned before, when we first started out, they let me be head of the corporation.

THE COURT: First, so the Jury will know, did they build a plant then?

THE WITNESS: No, we still operated out of the original barn for approximately -- well, a little over a year.

THE COURT: All right.

A. (Continued) And then when the plant was built, we moved from the barn to the new plant, and that was May of 1961. And after a couple of years, they started to send outside people in and they started to do things without consulting me. So I complained to Mr. Willman, who was the president of the corporation at that time, and he asked me to step down from the presidency of the company and become a senior scientist, and this, I refused to do. And in the summer of 1967, an organization

chart was issued which did not have me in any position of head of that corporation. In fact, I was not on the chart at all. And they still continued to do things without consulting me. So this is when I sent the letter of September 16th, 1967 to Mr. Willman.

Q. Mr. Sheridan, I show you what has been marked as Defendant's Exhibit S and I ask you if that is that letter?

A. This is the letter.

Q. All right. Will you continue? What happened after that, sir?

THE COURT: What is the date of that letter?

THE WITNESS: September 16, 1967.

THE COURT: All right.

A. Several days later I received a letter from him dated September 19th, and after reading and studying the letter, I concluded that the company had breached my contract, in fact, or in effect, had fired me as president of the corporation, and then --

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(p.1663 l.24 -- p.1664 l.14)

Q. All right, go ahead, sir, I am sorry to interrupt you. What did you do then?

A. On October 9th, I left the company.

Q. Mr. Sheridan, I show you what has been received in evidence as Defendant's Exhibit A, and I ask you if you can tell me what that is?

A. This is the letter I sent to Mr. Willman on the day I

left.

Q. Okay, sir, thank you. I am sorry, what was the date of that letter?

A. October 9th, 1967.

Q. All right. After October 9th, 1967, did you have any further contact with Brunswick?

A. Well, they attempted to try and get me to come back with the company.

Q. And what happened? Did that work out?

A. That just didn't work out.

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(p.1664 l.18 -- p.1665 l.1)

Q. Mr. Sheridan, was Sherwood Medical Industries in existence on October 9th, 1967?

A. No, it was not.

Q. Have you ever worked with Sherwood Medical Industries in any capacity?

A. Not that I am aware of.

Q. Have you ever had any contractual relationship of any kind with Sherwood Medical Industries?

A. No, I haven't.

(p. 1669 l. 14 -- p. 1672 l. 4)

Q. Did there come a time, Mr. Sheridan, when you entered into an arrangement with American Hospital Supply Company?

A. Yes, sir.

Q. And can you tell us approximately when that was?

A. Approximately April of 1971, I think.

Q. What was the nature of that agreement?

A. We were to manufacture our line of tubes and catheters, and they would take on the job of promoting them and selling them.

Q. Did there come a time when, pursuant to that arrangement, an order was placed by American Hospital Supply for the clear conductive tubing made pursuant to Mr. Jackson's patent?

A. Yes, sir.

Q. When was that?

A. I believe it was sometime in December of 1970 or '71. I'm not -- I believe it is '71, yes.

Q. All right, sir. Now, did there come a time when that order was delivered to American Hospital Supply?

A. Eventually.

Q. All right. What happened in the meantime.

A. Well, apparently, American Hospital Supply, or an American Hospital Supply executive --

MR. TUCKER: Excuse me, Your Honor. I hate to interrupt, but I think that is an awfully general question to let the witness go off on. I would request he be individually questioned.

THE COURT: He should find out what he knows, actually, from conversation.

MR. ARNESS: All right, fine.

Q. Mr. Sheridan, confine yourself to what you know, what you had contact with yourself, and tell us, to get away from the general question,did anything happen with reference to that order that was placed in December, 1971?

A. Yes.

Q. What happened?

A. We received a telephone call. In fact, I am almost sure I received a telephone call from Mr. Fred Grossman from American Hospital Supply.

Q. What did he tell you?

A. He told me that --

MR. TUCKER: That is hearsay, Your Honor. If the Court please, the Grossman deposition has already been read.

MR. ARNESS: Your Honor, it is not hearsay what Mr. Grossman told him directly in a phone conversation.

THE COURT: Overruled. I am going to receive it.

A. He told me that there is a problem concerning the conductive tubing, because one of their people, a Mr. Dutch Schmit was contacted by Mr. John Willman of Sherwood Medical Industries in regards to conductive tubing, and that Mr. John Willman had told Mr. Dutch Schmit that they had an agreement with Dave Sheridan regarding conductive tubing which would not enable him to make and sell conductive tubing, and that they were going to look into it. In the meantime, they told us to put a hold on the order.

Q. Now, subsequently did anyone from American Hospital

Supply ask you to execute an indemnity agreement?

A. Yes, they did.

Q. And did you do that?

A. No, I did not.

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(p.1679 l.7 -- p.1680 l.11)

Q. Mr. Sheridan, I want to read to you a section from the May 28th, 1971 agreement which defines the product that we are at issue here in this lawsuit about. It is flexible tubing incorporating features for configuration of a conductive line similar to the products manufactured by Sherwood as of February 1969. Now, the question Mr. Sherwin is, have you ever made such a product?

A. No.

Q. Will you tell us why you say that?

A. Well, our tubing has a conductive filament along its outer surface. It is actually what is known in the trade as a piggy back configuration, and we have completely conductive funnel ends on each end of this tubing, and where Sherwood Medical's tubing, the conductive line is totally within the wall of their -- well, I shouldn't say totally. It is part of the wall of the clear tube, and they don't have any so-called funnel ends that are separate from it. It is an integral part of the tube. It is made by my bubble process. And they have, usually, what we call an integral connector on one end, which is a complete

248 bubble, and a funnel on the other end, which is actually half a bubble. Another feature of our tube versus their tube, or National Catheter's tube versus Sherwood Medical's tube, is, our connector makes a hundred per cent contact with another connector where they might want to adapt, where Sherwood Medical's tube only has a narrow strip where it has to make contact.

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(p.1686 l.2 -- p.1708 l.12)

Q. And do you recall when National Catheter was incorporated?

A. I think it was November of '67, as I remember it.

Q. And the corporation, of course, has shares of stock which its shareholders own and possess and you own and possess some shares of stock of National Catheter Corporation, is that correct?

A. I owned all of the shares of stock at that time.

Q. Do you recall how many shares that was, approximately?

A. I believe it was 250 shares of stock.

Q. And did I correctly recall your testimony recently to be that when you sold to Mallencroix, you sold them 256 shares of stock?

A. I think it was 265 or 64, something of that nature.

Q. Where had the other 14 shares come from?

A. Well, I think we incorporated for a thousand shares, but we only had issued at the time, 250 shares. So when I gave some stock to other people, I took some of that balance of the thousand shares and put it on top of the 250 that I had. That is what I remember we did.

Q. Thank you. Did the new National Catheter Corporation

commence manufacturing catheters thereafter?

A. Thereafter, yes.

Q. Do you recall what the first product was that you started to make?

A. I think the first product was an endotrachial tube or a suction catheter. I'm not positive at this time.

Q. Would you tell the Jury, please, what an endotrachial tube is?

A. An endotrachial tube is a tube used to be inserted in a patient just before surgery where they can hook the anesthesia machine to. It is put down a person's mouth through his larnyx or voice box into the trachea, and then they hook the anesthesia machine onto this, and then they start feeding the anesthesia gases, and they keep on doing this until the patient is finished with the operation, and then they start tapering him off of the anesthesia gases, and if they feel he will be able to make it on his own with his own breathing, then they will extricate or take the tube out of his throat.

Q. Does National Catheter continue at the present time to manufacture and sell an endotrachial tube?

A. Yes, we do.

Q. Is an endotrachial tube a catheter, Mr. Sheridan?

A. There has been a little controversy on that subject, but I claim that all catheters are tubes, but not all tubes are catheters. I consider some of the products that they call tubes, I still consider them as a catheter.

Q. So endotracial tubes are catheters, as you would define them, is that correct?

A. That is correct.

Q. We have done some homework, sir, and bought some of your good National Catheter products.

A. As long as you pay for them.

Q. We paid for them. I am holding up -- I am not going to mark it as an exhibit unless you want me to. For the jury's benefit, is this an endotrachial tube that I am holding up?

A. It is a certain type. I would just like to see what type that is. Yes, this is an uncuffed endotrachial tube. When they get into the adult sizes, they have to put a cuff on it then, and this tube does not have a cuff on it. So before they use it, they have to put what we call a slip on cuff onto that. It is an inflatable bag so when they put an endotrachial tube down into a patient, after they get into the patient's trachea, they have to blow up the cuff or balloon to make a seal, so when they start putting the gases through the tube into the patient's lungs, that there is no leak coming back down the cuff. And another major function of that cuff is, if the patient aspirates, which means, throw up, that none of the aspirant gets down past the cuff into the patient's lungs. That is basically the functions of a cuff on an endotrachial tube, and that one does not have a

cuff on it, so they have to put a slip on cuff on that tube before they use it.

THE COURT: What is the price of that tubing?

THE WITNESS: That particular tube sells to a hospital for approximately oh, 90 cents.

Q. And who was the inventor of that tube, Mr. Sheridan?

A. Oh, tubes of that nature have been made for, I would say, many many years.

Q. Have you personally done any inventive work to modify the manufacturing process in connection with endotrachial tubes?

A. Yes, we have, we have several patents issued to that effect.

Q. And has National Catheter sold endotrachial tubes throughout the period commencing with its first starting to make tubes and up to the present time?

A. Yes, sir, it is a major portion of our business.

Q. Is what I am holding up now a suction catheter, Mr. Sheridan?

A. Yes, it is.

Q. And is this a sample of another one of the products that National Catheter started to manufacture and sell shortly after you left Brunswick and set up the company?

A. Not shortly after.

Q. About when did this come into the picture?

A. Oh, approximately a couple of years after.

Q. Did there come a time when National Catheter expanded its product line?

A. Yes, sir.

Q. And about when was that, sir?

A. We continually expanded the product line as we grew.

Q. So there is no one point in time that you would pick as the time the company expanded its catalog to a broader base, is that correct?

A. No, we just continually grew.

Q. Do you remember what the next product or category of products was that National Catheter started to manufacture and sell?

A. I believe we made a nasal-gastric stomach tube.

Q. First state generally what a nasal-gastric stomach tube is?

A. It is a stomach tube which is passed -- well, basically, it is a tube about 50 inches long. Basically, it is used to remove air or fluids from a patient's stomach or it could also be used as a feeding tube, and it is usually put through the nose into and through the esophagus into the stomach.

Q. Is that the kind of tube that might see in the hospital

if one visits a friend or relative who is recovering from major abdominal surgery?

A. Yes, it is.

Q. The thing that runs down the poor fellow's stomach and into that jar. When did you add that product to your line, sir?

A. I just don't recollect.

Q. Mr. Garber has not been successful in finding one of them. Is what I am holding up, Mr. Sheridan, a sample of a -- I'm sorry, a nasal-gastric stomach tube?

A. That is what we call our Ventrol 11 tube.

Q. And what does Ventrol 11 refer to, Mr. Sheridan?

A. Well, it is a double Lumen tube. Instead of having a double line, a Lumen means the inside of a tube, the hollow section.

Q. If I can hold it in front of the jury --

A. You can't see the double Lumen in that tube unles you cut it in half and look at it endwise, but it is a double Lumen. There is a major Lumen which consists of about 80 per cent of the interior of that tube, then there is another Lumen with the partition

Q between the major Lumen and the secondary Lumen.

Q For the record, I will cut the tube in half.

A It is too bad you picked a small one. It is difficult to see. But if you look at it endwise, you can see

the two Lumens and the partition in between.

THE COURT: What do you call that, a Lumen?

THE WITNESS: L-U-M-E-N.

Q. And what does Lumen mean, sir?

A. That is the section, the hollow part that goes -- that is in the interior of the tube.

Q. And has National Catheter been manufacturing and selling nasal-gastric stomach tubes, incidentally, from the period when it started up to the present time?

A. Yes, sir.

Q. Has National Catheter been selling these three products which you have been discussing for us in competition with Sherwood?

A. On the suction catheters, on the stomach tubes, on the endotrachial tubes with a cuff, the endotrachial tube with a cuff, we had no competition with Sherwood Medical that I am aware of. They have been attempting to make one since the same time we started, or right after we started, and they have not been successful in making a practical saleable endotrachial tube.

Q When David Sheridan left Brunswick in 1967, David Sheridan's know how to put together such a tube also left at the same time, is that correct?

MR. ARNESS: I object to that, Your Honor,

and that is not in evidence.

MR. TUCKER: I think it is a proper question.

THE COURT: I will let him answer. Do you understand what he is asking you?

THE WITNESS: No, I am going to ask him to repeat it.

(The pending question was read back by the reporter.)

A. No.

Q. Did you develop the technique for putting together that tube, subsequently, sir?

A. Yes, sir.

Q. And was that technique developed sometime between October 1967 and May 1971 when the settlement agreement was signed?

A. Yes, sir.

Q. What is the next product that you can recall for us, Mr. Sheridan, that National Catheter commenced to manufacture and sell after its business commenced in 1968. I apologise for the clumsy question.

A. I believe we made a yankour sucker tip.

Q. And what, sir, is a yankour sucker tip?

A. This is used during surgery to keep the surgeon's field dry.

Q. And that is a product that is actually used in what we have been calling suctioning throughout this case, is that correct?

A. Yes, sir.

Q. And is that a specialized suction unit?

A. No.

Q. Is it a general purpose surgical suction unit?

A. Yes, sir.

Q. And have you manufactured yankour sucker tips in competition with Sherwood during the period of time that you have been making those tips?

A. That is what I am talking about, the yankour.

Q. Yes, sir, and that you have been making in competition with Sherwood Medical, is that correct?

A. Yes, sir.

Q. What additional products can you recall for us that National Catheter commenced to make after it started its operations some time in 1968?

A. We made a poole.

Q. What is a poole,sir?

A. That is an abdominal sump drain.

Q. Is that spelled P-O-O-L-F, Mr. Catheter -- I read catheter on here, Your Honor.

MR. ARNESS: That's all right, that is his nickname.

MR. TUCKER: I thought you would like it. Shall we score one for your side on that one?

Q. Mr. Sheridan, I am opening a package which is called "Poole suction tip" and I am holding it up so the Jury can see it. Is that the device that you have just described for us, sir.

A. Yes, sir.

Q. And was that a device that National Catheter commenced to manufacture and sell in competition with Sherwood after National Catheter started its operation some time in 1968?

A. Not only Sherwood, but various other companies manufactured the same product.

Q. So National Catheter entered the market competing with a number of companies in so far as the poole suction tube is concerned?

A. All the other tubes that we have been talking about, other companies make the same products.

Q. What additional products can you recall for us, Mr. Sheridan, that National Catheter commenced to manufacture, and now let me ask you to limit yourself to a time frame, and the time frame I am interested in is the time frame when the company began operations through the time the settlement agreement was signed in May 1971.

A. That might be difficult for me because I would have to look at something that might refresh my memory as far as sales go, 20 years ago.

Q. I brought a whole box of items. Let me see if this item, which is called versi-cath, refreshes your recollection, sir.

A. Yes, sir.

Q. And that is a product that National Catheter commenced to manufacture and sell during this time frame that I described for you?

A. Yes, sir. That is probably the oldest type catheter, one of the catheters ever made, hundreds and hundreds of years ago. That is a urethra catheter used for drinage of the bladder, and they have taken samples out of the Roman ruins of urethral catheters made out of bronze. So that type of catheter has been made for a good number of years by every catheter manufacturer in the word, I would say.

MR. TUCKER: I think the record might reflect a collective wince of everyone in the courtroom when Mr. Sherwin indicated they used to make these things of bronze.

Q. Were they making these urethral catheters by the process that you described to us, sir --

A. Yes, sir.

Q. -- prior to your innovations in which plastic extrusion processes were applied to catheters?

A. No, there was another company making those catheters before I did out of plastic.

Q. Who was that, sir?

A. Pharmaseal.

Q. I am next opening a page which is called tracheostomy tube, Mr. Sheridan.

A. Yes, sir.

Q. I forgot to ask, with respect to the versi-cath, is that a product which National Catheter has manufactured and sold in competition with Sherwood?

A. We sold it. We were in competition with everybody in the business.

Q. Including Sherwood?

A. Yes, sir.

Q. Let me direct your attention now to a product called tracheostomy tube, Mr. Sheridan, and I am holding it, again, for the Jury to see. Is that a product which National Catheter commenced to manufacture and sell sometime between the commencement of its business and the signing of that settlement agreement?

A. I believe so. It is one of our later products though.

Q. Do you remember about when this lawsuit was filed, sir, that we are in court on?

A. Not really.

Q. If I suggested mid-1972, would that refresh your recollection?

A. That sounds about it.

Q. And would you be able to tell us whether or not the tracheostomy tube was manufactured and sold by National Catheter some time prior to the filing of this lawsuit?

A. I don't recollect. As I mentioned, it is one of our later products.

Q. And is that product manufactured and sold in competition with Sherwood?

A. No, sir.

Q. Tell me something about my client I don't know.

A. They don't make that tube, that I'm aware of.

Q. I am going to open now something called "infant feeding tube", Mr. Sheridan, and I am going to hold it up for the Jury to see, and I am going to ask you the same question that I have been asking you, sir. Is this infant feeding tube that I am holding up a sample of a National Catheter product which it started making some time after it commenced business?

A. Yes, sir.

Q. And some time prior to the filing of this lawsuit, am I correct so far?

A. Yes, sir.

Q. And to your knowledge, is this product manufactured and sold by you in competition with Sherwood?

A. In competition with Sherwood and everybody else in the business.

Q. I am going to now open to a page which is called "vari-form nasal oxygen cannula with connecting tube", and I am noting for the record, this is a green tube. Is there some reason that this tube is green, sir?

A. In the hospitals of this country, anything that transports oxygen is colored green.

Q. Is that a universal way of telling that oxygen is passing?

A. In this country. In Europe, it is blue.

Q. During the period commencing with National Catheter's going into business, and extending through to the signing of the settlement agreement, and beyond that to the filing of this lawsuit, did National Catheter commence making a nasal oxygen cannula with connecting tube?

A. I'm not sure. That is one of our later products also. It may have been after.

Q. Perhaps, perhaps not, is that correct?

A. That's correct.

Q. And is this product likewise sold by National Catheter

in competition with Sherwood?

A. And everybody else in the business, yes.

Q. I am now going to open something called a thoracic catheter, Mr. Sheridan, and ask you if this thoracic catheter is likewise a product that National Catheter commenced to make after it went into the business and prior to the filing of this lawsuit, let us use that as a time frame, and that it has sold and sells in competition with Sherwood?

A. I think so, but I am not a hundred per cent sure, because that is one of our later products, too.

Q. What is the purpose that this thoracic catheter is intended to serve, Mr. Sheridan?

A. Well, the thoracic catheter is used after open heart surgery, where they do an open heart case where they have to remove a valve or put a valve in, or if they have to do some work on a patient's lung, they actually split the patient open, and just before they close up the major incision, they will use anywheres from one to three thoracic catheters, depending upon the operation and the condition of the patient, for post operative drainage. So before they close up the major incision, they will perform a stab wound beneath or above the major incision, and then they will put a pair of forceps, they are a pair something like you

might consider needle nose pliers, and they will insert that through the stab wound from the outside of the patient in through the skin, through the tissue, in between the ribs, then they will take the end, the blue end, and they will grasp that with the end of the forceps, and then they will pull it through from the inside out. They don't want to put the catheter from the outside in. They want to pull it in from the inside out, and then they will suture that catheter to the skin, and so it doesn't migrate after they have placed it, they will suture through the skin, and then they will suture to the catheter to keep the tube from migrating from within or out. Then they will connect it to -- they will cut the end off that particular connector.

Q. This here?

A. That's right, they will cut that off. They will put a fitting in that, a connector, a tapered connector, and they will hook that on to an underwater drainage seal, underwater connecting tube. That tube goes into a gallon jar which has about three inches of water in it. They place the end of that tube down one inch below the surface of that water so if there is any leaks from a patient's lung, that the air will be able to come out and go through the tube under the

water and bubble out. They want to get any air out, because in actual practice, there is a vacuum, a very slight vacuum within the pleural cavity, and it is extremely critical that there is no leakage of air back into the pleural cavity, and they are very fussy. They have to make an absolute tight seal there. They actually go to the extent of tying just to make sure they don't get any back leak whatsoever. And after several days, or a few days in some instances where they don't see any more bubbling, they will remove those tubes from the patient.

Q. That would be a good example, wouldn't it, Mr. Sherwin, of an application in the operating room where a positive air tight seal was essential?

A. You can say that again, because if there is any air leaks, the patient can die.

Q. And would you use tubing, connecting tubing such as Mr. Isaac Jackson's connecting tube to do that, to attempt to achieve that seal?

A. Oh, yes.

Q. Would you likewise take further steps to make sure that that type of tubing developed no leakage whatsoever?

A. It wouldn't be necessary.

Q. Is it done though?

A. Possibly.

Q. Life and death inst[illegible], you don't want to take any chances on mistakes, do you, sir?

A. That's right.

Q. There was at least one incident, wasn't there, Mr. Sheridan, when I believe your son Ross testified yesterday, that a sizeable number of suction tubes went into the field with faulty connectors on the end of them?

A. Yes, there was one incident of that.

Q. And you simply couldn't take a chance, could you, sir?

A. No. We immediately recalled them.

Q. You simply couldn't take a chance when you hook something like that up to a patient that that could happe[illegible]

A. That's correct.

Q. So one would take extra precautions, would they not, to make sure there was no leakage whatever?

A. We do that with all our connecting tubes.

Q. I don't mean in the manufacturing process, sir, I mean the hospital itself?

A. They attempt to give it -- to make sure it is a real tight seal there.

THE COURT: This might be a good time to take a morning recess. We will take ten minutes. Remember my instructions, Ladies and Gentlemen.

(After recess, the proceedings continued as follows:)

BY MR. TUCKER:

Q. Mr. Sheridan, I will next open a package which bears the name "ventral sump drain", and I will note for the record that it looks quite similar, to the layman, to the thoracic catheter, which you have just described to the jury. Was this ventral sump drain again a product which National Catheter commenced to manufacture sometime between when it started business and the filing of this suit?

A. It is possible, but I don't recollect. It is one of our later items also.

Q. And does National Catheter sell this item in competition with Sherwood?

A. Yes, sir.

Q. And do I correctly assume, Mr. Sheridan, that this ventral sump drain is also intended to drain parts of the body following surgery, and that again, this blue bubble like or bullet like configuration at the end is designed so that it can be drawn through the wound without harming the patient any more than necessary?

A. That's correct. That particular catheter is used after abdominal surgery for post operative drainage.

Q. And the thoracic catheter is used following chest surgery?

A. That's correct.

Q. Mr. Sheridan, over the years, have you personally spent time in operating rooms in working in the development of these products?

A. Some period of time, yes, sir.

Q. And about what time is that?

A. Oh, I would say off and on the last ten years.

Q. I have got a package here, Mr. Sheridan and it is called "Ross Dennis intestinal decompression tube."

A. Yes, sir.

Q. Is that a product which National Catheter has commenced to manufacture some time between the period when it started through the filing of this lawsuit?

A. Yes, sir.

Q. And for the benefit of the jury again, I will open it and lay it before them. Do I correctly assume that this catheter is something which is surgically inserted down through the patient's esophagus, stomach?

A. No.

Q. Explain it, please?

A. That tube is used during intestinal surgery when the patient's stomach is opened, and if they have a block-

age along the intestines somewhere they will put this tube through the pyloric valve in through the pylorus and into the intestines, because if a patient has any blockage of intestine, the first thing he does is start to inflate. Actually, the gas will inflate his intestines and actually blow him up until he becomes extremely uncomfortable. So what they are trying to do when they are putting this tube down is, they are trying to cleanse before the point of blockage, and hopefully, if they can push it beyond the point of blockage, and then they won't have to cut into him as far as the intestines go, cut apart the intestines. If they don't do that, if the intestines are all distended with gas, if they cut into those intestines, all that stuff will just blow all over the place. So that is what that tube is intended for.

Q. Thank you, sir. Mr. Sheridan, I am going to show you this one. Now, this one is called "thoracic catheter", but it is called thoracic trocar catheter. Mr. Sheridan, I am going to ask you if this is a product which National Catheter commenced to manufacture and sell in competition with Sherwood?

A. Yes, sir.

Q. And this seems to be a thoracic catheter which, again, is a catheter for draining the chest area, as I

understand it.

A. Yes, sir.

Q. But this one has an unusual feature?

A. Yes, sir.

Q. It has got a metal rod, is that correct, sir?

A. Yes, sir.

Q. What is the function of that rod?

A. Well, that is used to puncture a patient's chest from the outside. Usually, when a person is involved in a car accident and he is thrown up against the steering wheel, he can break ribs and broken ribs in turn can puncture the lung, and in that instance, whenever the patient breathes, air is escaping into the pleural cavity, and if this is allowed to continue, he actually blows up like a balloon. I mean every portion of him, even his fingers and arms and head, and everything else. So if a patient, if they see signs where a lung has been punctured, they will take him into the emergency room and they will take that cap off that catheter, and the rod will be in the catheter, and they will make an incision through the skin in between some ribs, and they will poke that tube with that rod in it. The rod is there to give it stability and strength, and they will poke that through the tissue between the ribs into the pleural cavity, withdraw that

rod, hook the end of that tube on to the end of another connecting tube, and also in turn, down into an underwater seal to allow all the air to escape down through the water and no air to come back until the patient's lug will heal. In many instances, it will heal by itself.

Q. I think I may have asked you this, but in case I haven't let me. Is this also a product which National Catheter commenced to manufacture in competition with Sherwood, is that correct, the trocar catheter?

A. Yes, sir, that is also one of our later products, and it may be after the settlement agreement.

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(p.1712 l.10 -- p.1713 l.6)

Q. And you continued to receive those royalties actually through to the present date? Is that correct?

A. Yes, sir.

Q. And, Mr. Sheridan, my associate, Mr. Livingston, is doing some rapid calculations. It seems that the total royalties, according to our records paid by either Brunswick or Sherwood to David Sheridan through the end of 1964 amount to approximately $2.8 million. Would you agree that that is fair?

A. I don't know, but it would sound about that.

THE COURT: What is that figure?

MR. TUCKER: $2.8 million, Your Honor.

Q. And that would be pursuant to the licensing agreement which we described before, is that correct?

A. That's correct.

Q. And for 1975, the figures that we have, which, I believe, were the same figures that were submitted to you, reflect royalties in the neighborhood of a half million dollars?

A. That's correct.

Q. Is that consistent with your understanding, sir?

A. Yes.

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(p.1717 l.1 -- p.1718 l.10)

Q. So at the time you signed the settlement agreement, you would either have known that the patent had issued or you would have known that the patent was about to issue with respect to the suction tubing which is the subject of this lawsuit?

A. I would assume so.

Q. And did you ever discuss with Mr. Jackson the question of whether the presence of a patent on the Naional Catheter clear conductive tubing would enable you to confidently sign the settlement agreement in this case which settlement agreement contained the provision that we are arguing about in this court, did you ever discuss that subject with Mr. Isaac Jackson?

A. No. You mean right at the time the patent was issued?

Q. That or prior to the time?

A. Prior, yes, we had discussed it.

Q. And what was the substance of those conversations, the relationship between the Jackson patent and the language in the settlement agreement that we are talking about today?

A. Well, we just felt our tube was different, period. And we did get a patent to issue on it.

Q. Did you agree, yourself and Mr. Jackson, once you had a patent issued on it, you could comfortably sign the settlement agreement which has the language that is in this lawsuit?

A. Yes, sir.

Q. Now, you testified, Mr. Sheridan, that no one from Brunswick or Sherwood had asked if you were planning on marketing suction tubing with a conductive line running along its length, is that correct?

A. That's correct.

Q. And may we correctly assume then that your testimony is that since no one asked, you didn't tell them?

A. That's correct.

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(p.1725 l.2 -- p.1727 l.16)

Q. And for the year ended March 31st, 1974, the difference between National Catheter's assets and liabilities, according to the financial records, was $3,020,000. Does that sound about right?

A. Sounds about right.

Q. Now, I have stopped with the balance sheet for the year March 31st, 1974 where the difference between National Catheter's assets and liabilities, were $3,020,000, but if anything happened to National Catheter in July 1974 --

A. We sold the company to Mallencroix.

Q. And when you say we sold the company, do you mean -- I think you testified to this in cross-examination. Do you mean you gave Mallencroix all of your shares of stock in National Catheter, and Mallencroix and a few other shareholders, approximately 500,000 of its shares?

A. Yes, sir.

Q. And would it be fair to say that the value of National Catheter as represented by the different between assets and liabilities as of the time you sold the company to Mallencroix was something in excess of $3,000,000.

MR. ARNESS: Objection, Your Honor. He has been talking net worth. The value as an ongoing

business can be far greater than a net worth.

MR. TUCKER: I will accept that.

Q. Do you understand what your counsel said, sir?

A. Yes, sir.

Q. And using these figures as he has defined them, what was the net worth of National Catheter at about the time that you sold the company to Mallencroix?

A. I don't recollect.

Q. Something in excess of $3,000,000, don't you agree?

A. Yes.

Q. And how much did Mallencroix pay for National Catheter?

A. Approximately $22,000,000.

Q. And that would be something around seven times the net worth of the company, is that correct, sir?

A. They usually don't buy companies that way. They usually buy companies with a price earnings ratio on the profits they have at that year, not the net worth of the company.

Q. How would you characterize the price earnings ratio of National Catheter during the year before Mallencroix paid $22,000,000 for it?

A. I don't know, I never tried to figure it out.

Q. As president of the company, sir, state your best estimate?

A. I don't have any estimate, even though I am president

of the company.

Q. Now, with respect to this $22,000,000, Mr. Sheridan, Mr. Jackson testified that he got about a million dollars?

A. Yes, sir.

Q. And if I correctly recall the records that we have seen, your son Ross got about two million dollars?

A. That's correct.

Q. And your daughter Davine got about one million dollars, is that correct?

A. That's correct.

Q. And that would leave about $18,000,000, is that correct, sir?

A. Yes, sir.

Q. Who got that?

A Dave Sheridan.

(p.1756 l.22 -- p.1757 l.6)

Q With respect to your relationship with Mallinckrodt, Mr. Sheridan, do you have a contract with Mallinckrodt which contains any restrictions on your ability to compete with Mallinckrodt?

A Yes.

Q What is the nature of that restriction, sir?

A It means if I leave them, that I can't compete with them for a period of years.

Q How many years is that, sir?

A I guess five years.

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(p.1786 l.2 -- p.1786 l.16)

Q To mention, Mr. Sheridan, with the first year in which National Catheter went into business and going through until its acquisition by Mallinckrodt, did its sales increase year by year?

A Yes, sir.

Q And the various records to which we have been making reference show thatNational Catheter's sales, during the ten month period in 1968, were only $12,774.00, and that by the end of 1972, National Catheter's annual sales had gone to about $2,350,000.00. Does that sound about right?

A Yes, sir.

Q And has the business been what you consider a profitable one during that time?

A Yes, sir.

***

(p.1787 l.12 - p.1788 l.5)

Q Now, would you let me call your attention tothe second paragraph and ask you to read that to the Ladies and Gentlemen of the jury, and tell me what he told you in that paragraph?

A 'As head of Sheridan, your duties are under the general guidance of the marketing units here to spearhead product development in the Sheridan and Argyle product lines. You have no other duties.'

'On the other hand, all people at Argyle other than you and your product development staff report directly to Ben Kliss, Plant Manager,

who in turns takes directions from Joe Scalisi, as you know.'

Now, how many people were there at the Argyle Plant as of September 19th, 1967?

A Oh, I would guess, approximately three hundred.

Q And how many were there in the product development staff?

A Two, possibly three people.

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(p.1791 l.1 -- p.1791 l.7)

Q Mr. Tucker asked you whether if Mr. Willman knew that you were going to manufacture a clear conductive tube and he would have signed the agreement.

If you had known that Mr. Willman would complain about you making a product based on Isaac Jackson's product, would you have signed it?

A No.

***

(p.1793 l.23 -- p.1795 l.1)

Q Mr. Sheridan, once the idea of Ike Jackson's patent is communicated, is there any know-how required to produce the product?

A None, no.

Q When you left Brunswick -- let me follow that up a minute.

Mr. Sheridan, is that because, as Mr. Tremblay told us, any skilled extruder, once you tell him what the secret is or what the invention is, can do it in fifteen minutes or so?

A Correct.

Q When you left Brunswick on October 9th, 1967, after having received Mr. Willman's letter, did you have any know-how that you had not communicated to Brunswick?

A No.

Q Since you left on that day, has you used any trade secret that belonged to either Brunswick or Sherwood?

A No.

Q Have you made any product since that time based upon any of the patents that you licensed to Brunswick?

A No.

Q Are the products that you have manufactured since that time , all either things that you have thought of since you left them or that were know to and commodity products that are made by all other manufacturers, or production items that are made by all other manufacturers?

A These are all our own ideas.

Exhibit Proffer
(p.1742 l.19 -- p.1745 l.16)

MR. ARNES: Thank you, Your Honor.

At this time, I would like to offer one remaining exhibit. That is Exhibit B(t) which was identified during the course of Mr. Garber's testimony.

Now, this document, I did not introduce at that time, because Mr. Garber indicated that it was prior to his going to work for the company. But it is a record kept in the regular course of business supplied to us by the Plaintiffs, and it is correspondence from Mr. Marshall to Mr. Neiman of the law homeoffice of Brunswick in which he talks about John Willman's clear desire and intention with respect to the May 21st, 1971 settlement agreement. Now, Your Honor, this morning Mr. Sheridan was cross examined with reference to when his negotiations on that started, and he indicated it was in 1968, I mean, he was asked questions about his intentions. This document which I would now like to offer to Your Honor, is the best evidence of what Mr. Willman's intention was, stated from his own Counsel and in a record kept in the regular course of business.

THE COURT: Are you familiar with that?

MR. TUCKER: Yes, sir. We make objection to it. If Your Honor would care to read the document

first, I will ask then to be heard.

THE COURT: (Looking at Exhibit)

THE COURT: All right.

MR. TUCKER: May I take it, Your Honor, while I address myself to it?

THE COURT: I don't understand all of it, but are there only parts of it that you object to, or all of it?

MR. TUCKER: No, we object to all of it,period. It was written three years prior to the settlement agreement which is the subject of this lawsuit, and it does not, as one might infer from what Mr. Arnes said, explain the meaning of the May, 1971 settlement agreement. That is point number one.

Point number two: they have had this document for an ample time to obtain whatever probative evidence might be available, and to simply produce a document unexplained by which one Brunswick employee purports to state the desire of a second Brunswick employee is, in our judgement, of no probative value whatsoever. The thing is full of ambiguities which might call for proper explanation. At the eve of trial to put us to the decision of bring out Mr. Ken Marshall in order to have to try to explain away this document is, I think, unfair to us.

Mr. Garber stated that the document was written long before he came to the company. He stated also that he cannot identify it. He did not identify the document except to state that it appears

to be a document from our files, which we do not dispute.

Incidently, I have one other objection also to make known to Your Honor. Finally, it does not purport to be a document kept in the regular course of business. It purports to be a memo in which Mr. Marshall tells what Mr. Willman's desire is. They had the document when Mr. Willman was here to testify. They could have called this document to the attention of Mr. Willman and asked whether the document correctly and accurately reflected what his desire was. Mr. Arnes says this is the best evidence of Mr. Willman's intentions.

I respectfully submit that is just absolutely incorrect. On that basis, I object to the document.

THE COURT: This seems to be serious. I will reserve on it. We don't need this right away, do you?

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Transcript of April 16, 1976
Interrogatory Proffer
(p.1854 l.25 -- p.1855 l.19)

MR. HENSLER: Number 19: "Does Sherwood contend that the conductive line tubing manufactured by National Catheter and Sheridan infringes any patents owned by or licensed to Sherwood?"

And then it goes on to request the

factual basis for the contention if the answer is yes, but the answer is no.

THE COURT: No, I think in regard to those, and we did discuss it up here at the Bench outside of the Court Reporter being present, and I think I do state now for the record, that these are contentions that are requested. In my experience and my judgment, I don't think that they should be given to this jury.

MR. TUCKER: And we note formally an objection so the record reflects our own objection to Interrogatory Number 19.

THE COURT: I sustain it.

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Exhibit Proffer
(p.1861 l.3 -- p.1863 l.9)

MR. ARNESS: Your Honor, yesterday I asked the Court to introduce Exhibit BT and I think you reserved ruling.

THE COURT: I am inclined to sustain the objection on the Rule 402. You may state your position further for the record. In my judgment, it is something that could lead to confusion. It may be relevant on some things that have passed, but I don't know how relevant it is to the issue we have as I view it in this settlement agreement that was made in 1971. This letter was written in 1968. But if you

want to express your position, Mr. Arness, you can, because I do think we spoke about this same type of problem. But you can state it again.

MR. ARNESS: Thank you, your Honor. I don't know whether we stated it in the presence of the Reporter or out of the presence of the Reporter. I will repeat it briefly. The basis of our position is at about three parts. One, Mr. Sheridan was asked by Mr. Tucker on cross-examination with respect to when the negotiations for the 1971 agreement commenced. He brought out, elicited, that that was in 1968. He was asked questions about what his position was at that time, what his intentions were. This document is directly relevant to that area which was opened up by Mr. Tucker. Moreover, this is a communication between Mr. Marshall, who is Mr. Willman's direct subordinate and second in command to the lawyer who has already been identified in this record of Brunswick. It shows that Brunswick --

THE COURT: Is that Mr. Neiman?

MR. HENSLER: Yes.

THE COURT: Isn't he the man who is going to testify?

MR. HENSLER: No, that is Mr. Nebel.

THE COURT: How do you spell that?

MR. HENSLER: N-E-B-E-L.

Mr. Neiman has been identified as the counsel for Brunswick. Now, this shows a combination, and we use the word, of our conspiracy between Sherwood and Brunswick. It also shows the tension that those corporations had in 1968 with reference to the formulation of this agreement, which intent is shown clearly by this document to relate to the patents and to an attempt to extend the patents which, of course, is the bullwork and framework of our contention both in the defense of Plaintiffs' action and in support of our counterclaim in this case.

MR. TUCKER: Your Honor, I fully stated my position yesterday on the record.

THE COURT: All right. I will sustain the objection.

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Transcript of April 19, 1976
Colloquy Between Court and Appellants' Counsel
(p.2111 l.12 -- p.2140 l.25)

THE COURT: What evidence do you have in this regard that there was an anti-trust conspiracy and a monopoly design?

MR. ARNES: We have abundant evidence of that, Your Honor.

THE COURT: Tell me some of it.

MR. ARNES: Fine, all right.

THE COURT: Those are very ponderable principles of law, and an anti-trust case is exceptionally difficult as a proposition to prove.

MR. ARNES: Well, Your Honor, I know you would permit me, just as an aside for a moment: I know everybody says that, but it is my experience that there is one opinion in anti-trust law, and

that is the Doctrine of Reasonableness, and when you say that, you have said almost everything there is to say about it. You can find all kinds of anti-trust cases saying what you want to. But the Doctrine of Reasonableness is what the Courts pay attention to.

Here is our anti-trust case: number one, it has to do with Section one, alleged Section one violations, and what do you have to show. There, there was a contract or a combination. Let me stop. There certainly was a contract. A contract attempting to impose a restriction on Sheridan and National Catheter.

Now, the Plaintiff said grown men can get together, in their paper, and they say in their paper, and if their ideas are open, they can contract.

Your Honor, the Supreme Court said that you cannot use the Doctrine of In Pari Delicto as a Defense in an anti-trust case.

Well, that is the Supreme Court of the United States. They cannot argue, as they have in their briefs, that because Sheridan has his eyes wide open that he cannot raise a contest as to this contract.

The Supreme Court says that the public interest is of paramount concern, and In Pari Delicto will not be applied as a defense.

Now, there has to be a combination, also. Your Honor, just to show you how far off we have gotten in our thinking on this case --

THE COURT: Where is the combination? That is what I can't find.

MR. ARNES: The combination is this --

THE COURT: You have a clash of strong personalities, and Woolman and Sheridan, and I heard both of them here.

MR. ARNES: Surely, but that had nothing to do with the legal issues. The legal issue combination is this: Brunswick had a license to use Sheridan's patent. Sheridan never licensed Sherwood. Brunswick and Snerwood combined to use the patent license, and they combined to enter into a contract to impose the restriction on Sheridan and National Catheter.

THE COURT: Didn't Sheridan work for Sherwood?

MR. ARNES: Never. That is the point. That is the point: never, never. There are two things that Your Honor has maybe not focused on here:

one is that Sherwood never even came into existence until two months after Sheridan was fired.

Secondly, National Catheter, one of the Defendants in this case, and a Plaintiff in the anti-trust case, has never had any contractural relationship with Sherwood or with Brunswick.

Now, Your Honor, Mr. Tucker, before we left this Court last Friday in making -- he did not make his motion in full, but he said, Your Honor, in addition to the papers, he had another matter to raise, and that was that Sheridan hadn't proved any damages.

Well, Your Honor, Brunswick hasn't proved any damages in this case. Brunswick never even had anything to do with this case after December, 1967, and yet they are presenting the case. And so it is so apparent that even in their papers they put down, and I made a note of this: they put down Sherwood's claim. Well, they haven't proved any damages in Brunswick's part. Here there are two separate corporations, one traded on the New York Stock Exchange and the other traded on the American Stock Exchange. And we have been treating them as though they are one. And thus far, in the remarks that were made, I am afraid that Your Honor has thought

of them as one.

THE COURT: Where did the evidence come that they combined, and conspired, no matter who he worked for, to impose an unreasonable restraint on trade in this particular article?

MR. ARNES: They combined because Brunswick had the license to use the patent, and they combined to give Sherwood the right to use the patent. Then, they both joined in the agreement, with the agreement of May 28th, 1971.

Now, that is enough combination --

THE COURT: There is nothing illegal about that agreement?

MR. ARNES: Not if you interpret it the way that we have, and in support for our motion for a directed verdict.

THE COURT: That agreement could be construed not to restrain anybody.

MR. ARNES: Absolutely, and then their case would have to fall immediately.

But if it is construed -- if it is construed to -- let me go back just one second and I want to show you something very interesting in this case.

Brunswick had a patent that was given

to it under the license agreement to make Dave Sheridan's conductive tubing. They made it, and Your Honor saw Exhibit four, what it was.

Now, in December, 1967, two months after Sheridan was fired, Brunswick gives, apparently gives Sherwood the right to use it because from that point on, Sherwood made the product. Now --

THE COURT: Didn't he continue to get royalties?

MR. ARNES: Yes.

THE COURT: Sheridan. He knew that Sherwood was making the product?

MR. ARNES: Yes, he did, but let me go further. He did, and there is nothing before Your Honor contesting the license agreement or the royalties.

THE COURT: That is a serious point.

MR. ARNES: That is one thing that the parties have never quarrled about. But Sherwood is making the product now. Okay. Now, when the first lawsuit was filed before Your Honor, it is a very interesting matter: the first count of four counts in the complaint was the only one dealing with the employment agreement. And in that count, Brunswick was the only Plaintiff; Sherwood was not.

Sherwood asserted only interest as far as the original -- the only interest in the continued use of the patent.

Now, they settled that case, and in May 28th, 1971.

THE COURT: I thought they settled it, and they did.

MR. ARNES: Sherwood's only interest and only claim asserted had to do with the patent. Sherwood did not have any interest in the employment agreement, and never did; only the patent.

Now, what happens? They have two sections in the agreement: one, they say that they bind Sheridan not to infringe the patent. Now, we have got stipulations in this regard that he did not do that.

The second section is 5-b: now, if you interpret it the way we say Your Honor must, then, they are -- they can make any product as long as it isn't similar to the one -- to the product that they were making under the patent that Sheridan licensed them.

But if you interpret it the way they have, and the way they did -- Woolman was in this -- and the way they did when they filed this lawsuit, then it is a clear attempt to convert the patent

license for the conductive tubing that Sherwood had, and claimed in the first lawsuit, to protect not only to make that product but to preclude any other product that was related to that product line.

Now, that's where you get to the patent misuse cases. Any agreement which has that affect is a per se, section one, anti-trust violation.

Now, Your Honor, I need no more than the papers that Plaintiffs'have filed in this case to demonstrate to Your Honor two things, and I also have a fall ba[illegible] position, but I think that from these papers I can demonstrate to you that we are entitled to a directed verdict as a matter of law: and that we are entitled, as a matter of fact, to a directed verdict in an anti-trust claim, but I certainly can prove that if that is not so, that there are factual issues which must be determined, because it is the intent, and it is the meaning and it is the purpose, and all of those things, that are the defenses that they raised, you see.

If they are going to achieve that, that is not per se, then they have to get into the Reasonableness Doctrine and the intent and the purpose and all of that are factual issues which they have got to satisfy the jury on, or we do.

Now, let me just allude to their papers to show you what we mean, Your Honor, and I am going down, because I went through the papers very carefully this weekend, as I know Your Honor did, but I picked out the issues that they have raised, and to show Your Honor how they must fit into either a directed verdict for us, or a jury question.

First of all: you cannot use the Doctrine of In Pari Delicto. I have stated that.

Now, in their papers they say that they must demonstrate the reasonableness of the non-compete agreement. Inherent in that is that if it is not reasonable, it is bad. Then they say in their response to our know-how, and the non-compete memos, they say, that the provision is not included for the purpose of fostering monopoly.

Well, that is a fact question. They can't say it and make it true.

Then they say that it was reasonable in subject matter, time and scope. If that is relevant, that is a fact question.

They say there is no [illegible]dship on David Sheridan and they point to the fact that he has made so much money. But they have forgotten that if the agreement is valid, that you look at

it from the four corners, and he would not have been permitted to do these things that he has done. You look at the agreement, and it is four corners to determine whether it is valid or not.

Sheridan ignored it and he did fine, but that is not the test of whether it is in on its four corners to constitute a hardship, but that is another factual question.

The public interest they say is paramount, and agreement cannot be sustained unless the public interest is served. What is the public interest? And isn't that a factual issue?

Now, they say that there is a public policy that would sustain the settlement agreement. But, Your Honor, that is a policy of the law, to settle private disputes. The policy of the law in the public interest in this case lies in the doctrine against non-compete agreements unless they serve reasonable and legitmate purposes, and the doctrine of public policy again permits anti-trust in restraint of competition.

Now, they claim that David Sheridan, in signing the agreement, acknowledged that the restrictions were reasonable. That is an illegal argument, Your Honor, because the Supreme Court

says that you cannot make it. That is the In Pari Delicto.

They say that whether it is necessary or warranted is an issue. Well, if it is necessary or warranted, that is for the jury to determine.

Then, they say, and this is where they really get off base, Your Honor: they say that what they really acquired in 1960 was Sheridan's inventive skill and technology. Your Honor, you have had a reluctance to get into that in this case, and you have excluded evidence, and you stated it is transcendent, but let me show you what they acquired in 1960, because they could never acquire Dave Sheridan's rank. What they acquired was the assets of the business, and whatever goodwill was attached to it, and they have admitted in their position that it did not have any goodwill. It was only worth $100,000.00, and just barely starting up. They can't use that, the acquisition of the business, and it is necessary to protect its goodwill on the restrictive covenant that they impose eleven years later.

Now, so they say, they say that they acquired what else? They acquired a license agreement. They have not contended that Sheridan violated the

patent license agreement, and nobody else has.

Next they say they acquired his know-how. They had an employment agreement under which Sheridan was to divulge his know-how. But that is where they are off base. Know-how, Your Honor, is that information which is to be conveyed along with a patent, or something else, to help somebody understand it. Once it is conveyed, you have complied with your contractural agreement, and as long as you are employed, you have a continuing obligation to give your employer the benefit of your skill and your faithful service.

But once you are fired, or once the employment ceases,for whatever reason, they do not have any right to say that whatever you do from that point on is theirs. You didn't buy the know-how; that is not know-how. Know-how is the obligation to reveal what you know at the time.

Now, we --

THE COURT: But to keep me clear because at times it is confusing: you have paragraph 5-b and I am sure that Mr. Sheridan entered into that contract, and when he did you were his lawyer at that time?

MR. ARNES: Yes.

THE COURT: And you read that, and it

had some mention, and it was directed to a particular conductive line tubing manufactured up to 1969 and they said we don't want you to manufacture, sell, or use that, and you agreed to that, and I don't understand where the great problem is.

MR. ARNES: We agreed to it, and we still agree to it.

THE COURT: There must have been something, or you would not have given this $100,000.00?

MR. ARNES: Well, the $100,000.00 we have heard a lot about that too. The $100,000.00 was broken up $35,000.00 for back salary that he was owed if they had terminated at the date that they could have, and instead of precipitously.

Part of it was for damages because they used his land and did not pay him.

THE COURT: I heard that, but wasn't that paragraph aimed at one particular objection and said we don't want you to make anything similar to this?

MR. ARNES: Well, Your Honor, --

THE COURT: I mean outside of his know-how and all of theother things, and we don't want you to make this, and that is what our dispute is about.

MR. TUCKER: Well, in our catalogue of February of 1969, he did not say that if Isaac Jackson invented a new and better tube that National Catheter would not make it.

THE COURT: I don't think that he did, either, but Isaac Jackson came along in 1972.

MR. ARNES: Yes, but moreover and more importantly there isn't a single bit of evidence in this case that David Sheridan had anything to do with making the product that National Catheter Company makes now.

What is has made on Isaac Jackson's invention and his patent, plus the know-how that he entered into the record of their own testimony that any competent extruder can do it in fifteen minutes.

THE COURT: I heard him testify that Mr. Sheridan was of some assistance to Jackson, and without question.

MR. ARNES: No, Your Honor. Let me refresh your recollection.

THE COURT: He testified that he thought it was a good idea.

MR. ARNES: But that was before May 28th, 1971. The patent was issued on May 25th, 1971.

The only factors in this record is what he did before that.

Now, I want to call Your Honor's attention --

THE COURT: But it is an interesting point for me and I don't know whether the jury was affected by it, but they had the patent three days before they entered the agreement, and there was no discussion at all about it.

MR. ARNES: They never asked him.

THE COURT: But I suppose that that was his position.

MR. ARNES: Whatever it was, there was nothing in the agreement that he had to divulge anything that he was doing.

THE COURT: That seems to be part of the business world at times.

MR. ARNES: Well, Your Honor, they didn't tell him a lot of things. We had evidence in the record, why didn't he call Woolman? Well, Woolman fired him without calling him, too.

THE COURT: You say that. I know that they are strong-minded people, and they disagree.

MR. ARNES: Let's get away from the

personalities, because the legal issues are what are important now, and the personalities don't have anything to do with that.

But there is no evidence in this record that David Sheridan did anything after that May 28th, 1971 time. Now, if Your Honor will look at this agreement it says from this day forward he shall not. It doesn't say anything about what he might have done before that.

Now, there isn't one shread of evidence in this entire record that David Sheridan did anything after May 28th, 1971, when he signed this agreement and bound himself not to do anything. Even if you took into view that that was enforceable which we say it is not, because even if a party voluntarily enters itself into an agreement that extends the patent, the law says it won't be enforced because he can't agree to that.

But even if that was not so, Your Honor, you have a record here that is devoid of anything that he did after April 28th, 19-- no, May 28th, 1971; absolutely devoid.

Now, to get back, now; they say that they have the obligation to demonstrate that this is reasonable. All right, now, Your Honor,

they have raised the question of ancillary restraint. In order -- thatis theonly way that it could be reasonable because otherwise unless it is attached to something, it gives legitimacy, and then it is wrong.

What is it ancillary to? Could it be ancillary to the purchase of the business because that was in 1969, and there wasn't any goodwill to protect, and that is the only thing that you have an ancillary restraint attached to the sale of the business, and that is goodwill. They sold some machines.

It couldn't be an ancillary restraint as far as the employment agreement is concerned because Sherwood wasn't a part of the employment agreement. Sheridan was never employed by Sherwood. Moreover, they fired Sheridan, breaching that employment agreement, and that is out, unless Your Honor wanted to submit that to the jury, and I don't see how we can because we have restricted the evidence on that.

Now, what is it ancillary to? It is ancillary to a settlement agreement? No, it can't be because McCullough, and the United States versus the National Lead involved settlement agreements

and the Courts struck them down and said you can't color and make right an anti-trust violation or an unfair restriction just by saying it is a part of a settlement agreement.

So what is it ancillary to? If Your Honor is going to swallow the story of ancillary restraint, you have to make them say what it is ancillary to.

THE COURT: I don't know whether I have swallowed that, but I am looking for the evidence that supports your counter claim. I am honest enough to say that I reviewed it carefully, and I was surprised that I count six witnesses or each side, live witnesses, and we had depositions and arguments, and I don't know why it took so long either, after I counted the six witnesses.

I have seen the testimony, and I have the yellow sheets to prove it.

I don't find evidence here.

MR. ARNES: Well, here is the evidence. There is a contract --

THE COURT: We can have a look at the legal theories and the allegation, and the case law, but we need evidence here.

MR. ARNES: Would you take a minute

and think with me in terms of what it takes to prove a Sherman Section one violation, and that is all it takes.

THE COURT: I have been around them.

MR. ARNES: I know. But,Your Honor, I think I might be helpful. It takes a combination or a contract. It takes a purchase to extend the patent beyond the protection of the patent. If it is -- well, it takes reasonableness and it has to be reasonable. And then it has to have the effect of restraining competition.

Now, we have all of those here, all of those elements, and what possible elements could be lacking? I don't care if you say it is inconclusive proof, and perhaps there is none. But there are elements in this case that the jury could find that there was a contracting restraint of trade, that its purpose was to extend the patent license to Sherwood under which it was making its tubing, and that it is unreasonable because it went beyond the legitimate purpose of Sherwood to use that patent.

Now, those are factual issues that the jury could determine in our favor.

Now, how about Section two? What do you need? You need to show there was a relevant

market. Now, Your Honor, whether you believe it or not, conclusively is beside the point. There is evidence in this case, without any question, that there is no product reasonably interchangeable with clear conductive line tubing for the purposes for which this is employed.

THE COURT: I don't know. There was the old black that they started with, but you could not see through it.

MR. ARNES: Every witness in this case says it is not suitable for operating use today. Everyone testified on that, said that.

Now, Your Honor may not believe that, but the jury could believe it because it is a factual issue as to whether they are reasonably interchangeable.

Now, the next thing you need if the purpose was to extend the patent monopoly, you don't need to go any further. But as to intent, if there was a monopoly created, or if the purpose was to create or extend a monopoly then, you got an issue for the jury.

Now, what is the evidence on that? The evidence is that they enjoyed a patent monopoly up until Dave -- December 1972 when that

was when the American Hospital Supply then began to deal with National Catheter Company. Up until that time they enjoyed the monopoly.

Now, wasn't their purpose, when they imposed this restraint, and wasn't their purpose when Woolman called to extend that monopoly or create it? That is an issue for the jury.

Next, you have to show if you cannot show monopoly, you have to show that they intended to do it. You need a specific intent and purpose and danger of probable success.

THE COURT: But you have isolated instances, and you have Woolman calling up Smith, his friend where he used to work, and American Hospital supply, and writing a couple of letters.

MR. ARNES: But you have something here that you don't have in most cases. You have evidence that not only we don't need to show a danger of probability of success. We show that they did succeed for nine months in keeping the product from mass distribution. They did succeed.

THE COURT: That is questionable, under the evidence.

MR. ARNES: Maybe it is, but it is in the evidence that they were going forward in

June of 1972, and delayed until March of 1973.

Now, the jury could believe that that delay was caused by John Woolman's calls.

Now, as far as a conspiracy or combination is concerned, you do not have to show a dangerous probability of success there. But you have to show that -- that is only one of them if they monopolize or attempt to do that, you don't have to get into the conspiracy, but again you have Brunswick and Sherwood combining to attempt to exclude competition from thi. relevant market.

Now, Your Honor asked a question at the beginning of this trial, and we answered it, that apparently a subsidiary , for the purposes of combination, are two separate companies. Now, in the Supreme Court case of Permolite, which I believe we cited to Your Honor, the Court -- the Supreme Court clearly stated that, and said if they chose to do business in two separate corporations, they accept the consequences that they can be held to be a combination.

THE COURT: I have refreshed myself on that one.

MR. ARNES: Now, those are our anti-trust counts. We also have common law counts here. The two common law counts of contract interference

which I have admitted to Your Honor, the only contracts that were actually interferred with were the two purchase orders, but they were clearly suspended, and breached.

Then, you have a business relationship under which the Defendant, and again, the jury need not accept every bit of the testimony, but the testimony here was that they were going forward with a business relationship as early as June of 1972, and they didn't go forward with it until March of 1973, and then they did, which is good evidence that would have earlier, if they could have, and we have shown the business relationship.

Now, the question is: was the interference with it justified or warranted, and was it done with an attempt to -- with the intent to interfere and disrupt that business relationship? Your Honor, the jury can go either way on that.

Now, the restatement section 768, says that on the question of reasonableness, that it might be reasonable for one to protect his business interest if the actor does not intend to create or continue an illegal restraint of competition.

Now, the jury should certainly find

here that Woolman's purpose in calling was to keep National Catheter Company from competing with Sherwood. And they could find that the -- that the position that Woolman was trying to protect was one based upon an improper extension of the patent.

Now, the restatement of 766 is similar with respect to the interference with business relationships.

Now, as far as our unfair competition count is concerned, again, Your Honor, I am not saying that that is over whelming, but the issue now, when you view it is: have we established a prima facia case, and if you view everything --

THE COURT: You seem to be saying the same thing as count two and three.

MR. ARNES: Count two and three, I agree with you, Your Honor, are almost identical. Count two is a contract and breach of a contract; count three is similar, but based on 766, the restatement having to do with contractural relationship, and not necessarily a contract breached. They are otherwise an almost identical concept, but we had to deal with both business relationship, and with contracts.

Now, as far as unfair competition is

concerned, if you view the evidence most favorable in the light of my client, which on the motion of a directed verdict we hope, we still want: you have the question of whether Woolman's calls and letters were reasonable on the basis of what he knew, or should have known, which is the torte concept.

Now, he has testified that he knew that American Hospital Supply either had or was about to purchase the product. He said that he called Dutch Schmidt before he checked with his patent Counsel, before he checked with anybody, without finding out even though the product right before him was labeled with a separate patent number, and on the basis that he had thought if they made any conductive line tubing, no matter whether it was different or not, it was a violation of the agreement.

Your Honor, a man cannot act off the top of his head in a callous disregard of the rights of other people and claim it is reasonable.

THE COURT: That was one man that said that.

MR. ARNES: But he was the one that did the act.

THE COURT: One individual said it.

MR. ARNES: And he did the act that we complain of, that triggered the whole thing.

What he should have done, what he should have done if he really wanted to protect a legitimate business interest is make an inquiry find out what is involved, and make an assessment and get an opinion, and then if he felt justified, do it, but he did not do that, and the evidence is that he popped off and hit them right where it hurt.

Now, the jury can conclude whether that is reasonable conduct or not. I don't know whether they are going to conclude it was. But I know that at that time he knew, or should have known that he was interferring with an attempt by National Catheter to compete with his business, and he was doing whatever he could to shut it off.

Now, the Court we just think cannot presume that the jury would conclude necessarily that he acted with reasonableness or justification. Nor can we postulate to the Court that we on that issue think that it is something that is conclusive in our favor, et cetera, but that is a jury issue.

Now, as I pointed out, Your Honor, Brunswick, we clearly are entitled to a directed verdict against Brunswick. They have proven no

damages in this case. They did not manufacture this product; they did not lose anything; there isn't one element of evidence in this case that showed that Brunswick was damaged at all.

Their brief, as I pointed out, they call it 'the Sherwood Claim.' Now, also I think, Your Honor, that there is no evidence in this case that any legitimate business interest was attempted to be protected here. The only thing that they were trying to do was to -- let me put it this way because it is clearer in my mind: what they had a right to do after October 9th, 1967, when Dave Sheridan was terminated, was to continue to manufacture the product under the licenses that Sheridan had granted to them.

Now, they did that, and the evidence shows that they progressed every year after that. That is conclusive evidence, I think, that they didn't need Dave Sheridan. They had his patent. He had already delivered his know-how, they were making it, and they continued to make it.

Now, there has not been any interference with their right to make the product that they were entitled to make.

But now, in 1972 comes another

product that they are not entitled to make, and they or their efforts are all directed to stopping that other product. They have no right to do that.

THE COURT: What if Dave Sheridan went out and made the exact product, Plaintiff's Exhibit four?

MR. ARNES: Then, Your Honor, we would have a situation where we would have a clear patent infringement, and they would bring the case, and I don't know of any defense to it. But that it -- that is what they had. That was all that Sherwood had, was a license to make the product based on the patent, and they could protect that to Kingdom Come.

That is why, Your Honor, we have heard so much evidence in this case or tried to, about the frailty of Jackson's patent. Well, Your Honor has accepted a stipulation that a patent is prima facia valid until it is attached --

THE COURT: From my experience they are frail, and you know that, too.

MR. ARNES: But I know Your Honor well enough to know that as an experienced judge knows --

THE COURT: The percentages are very high that the Courts declare most of them invalid.

MR. ARNES: But an experienced judge knows that if there is a prima facia validity that Your Honor will give the credentials unless it is attached. They could have filed in 1971 or 1972, and they found out that Isaac Jackson got a patent, and action to declare it invalid. But they didn't do it, and it is valid right now, in the eyes of the law until somebody attacks it and it is as valid as theirs. Nobody has ever attacked that Sheridan patent that was issued back in 1960 or 1961 or 1962.

But if somebody did, it would not be declared invalid. That is not an issue. Your Honor, we cannot engage in that kind of speculation.

THE COURT: I don't think that it is an issue. We are talking about a lot of things that are not issues, and that is the difficulty in getting our minds on what our problems are.

MR. ARNES: Well, our problems are, Your Honor, and as I started to say earlier: when you look at the pleadings that the Plaintiffs, themselves have filed in this case, you can see what the problems are, because every time they fashion an argument against ours, against our thrust, we come up with something that depends upon a factual finding.

Now and then they make a motion of a directed verdict.

Now, Mr. Tucker said earlier that he has difficulty formulating the argument as to why a patent misuse can't be from something other than an attempt to use the patent. The reason you can't is because that is not so. Your Honor, the patent misuse is involved in any agreement that has as its purpose getting around the immunity and the limited profession that the anti-trust laws gave to a patent. And the proof of that pudding is that these misuse cases involve many times the McCullough case and the Compton case did, and the Indianhead case did, which we have cited to Your Honor: a contention that the inventor cannot expand the use of his patent.

Well, no one could possibly say that any one used the patent leverage against the inventor to compel an agreement. That is where Mr. Tucker cannot formulate the argument.

When he says that the only time that you can prevail upon a patent misuse theory is when you try and use the patent wrong and he is just wrong and he doesn't have any legal support for it.

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THE COURT: I am ready to make my decision, and I am sure that I will disappoint Mr. Arnes and Mr. Hensler.

But I have reviewed the evidence carefully, and I am a Judge that always looks for evidence to support allegations. Otherwise I am not satisfied.

But usually when I have a jury, and it has always been my custom, and rarely have I ever directed a verdict and taken certain issues away from a jury, and that comes from the experience of knowing that the Court of Appeals, Second Circuit, Judge Frank years ago cautioned to get a complete trial, and then set aside.

But my conviction is firm, and it is strong that to withhold a decision at this time, and at this stage of the trial by a jury, in the exercise of caution, would be unjustified, and unfair to the Plaintiff, and contrary to the interests of justice, and contrary also to the firm conviction that I have in my mind that three counts of this counter claim have not been proven to the extent that they should stand, and that the motion for a directed verdict should be granted in this regard.

The counts that I am going to grant the motion for a directed verdict on are the counter claim counts, Count one, and that is the anti-trust Count; Count three, which is the interference with

business relationship; and the unfair competition count. I am going to let stand, because there is some evidence, at least to my satisfaction, that there was some testimony about interference by Mr. Woolman with the purchase order, and the calling of his friend, Dutch Schmidt of the American Hospital Supply Corporation.

So I have framed several questions in regard to that, and I do want to say that the case, as I viewed it, of course, is complicated because it comes in the middle of much other work, but I went back to something that I did in 1952, and I stated in a case, and it was an anti-trust case, that the proof of the Plaintiff is so meager on the ultimate issueable facts that mere speculation would be allowed to do duty for probative facts, even though allowing the most reasonable possible infe rences to be drawn for the Plaintiff from its evidence.

I stated that at the end of the Plaintiff's proof in this particular case, and that phraseology was set forth in the opinion of the Court of Appeals, Second Circuit, when it affirmed the dismissal.

That case is Syracuse Broadcasting

Corporation, against Newhouse, et al., and it is 319, F. 2D, 683 and that is page 683.

First, I checked the law again, to find out what you need for this important decision of a directed verdict and to take questions away from a jury, and the test that I find is most approved now is one in the Second Circuit, and it is used by Professor Wright in his textbook, and it says this, and this is the test that is recommended at least for our Circuit, that simply stated it is whether the evidence is such that without weighing the credibility of the witnesses, or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict reasonable men could have reached.

Now, that case is Simblest against Maryland, 427 Maryland, F.2D, and at page four, and that is Second Circuit, 1970.

So with that test, and my screening of the evidence, it is my judgement that the motion for a directed verdict of these three counts in that counter claim must be granted.

To get down to some of the factual things, at least that impressed me, I find the restraint in the settlement agreement, and that is

the section of this dispute, was an attempt to have wording in provision five B to restrict Sheridan, and National Catheter from manufacturing, using and selling flexible tubing of a certain limited type, and expressly stating in that provision that such manufacturing, using and selling referred to this particular tubing incorporating features or configurations of conductive lines, similar to the product manufactured by Sherwood as of February, 1969.

I think that that is an exact statement and for the lawyers to specify a limited restriction. There was, of course, at that time, a new and continuing consideration of $100,000.00 paid to Sheridan, according to this agreement, and again I go back to the reasoning which impresses me in Bradford against the New York Times, 501 F.2D, 51, and Second Circuit, 1971 and that, from my canvass of the evidence, there are no elements of unfairness that would invalidate the contract to the extent that there could be a decision that there was, per se, a violation of the Sherman Act which the Bradford case emphasizes in its writing, and in a footnote, that th e Sherman Act, of course, deals with unreasonable restraints.

The monopoly that is talked about here was one under a patent agreement for some years, and its licensing, and to the Plaintiff, Brunswick, and of course, it is established that that type of monopoly is accorded to support of law.

I find no evidence in this record of a conspiracy, and they are serious charges, or a combination, to prove a monopoly in regard to the allegations made in that respect in the claims of the anti-trust, Count one. There is no evidence, apparent to me, to support the serious charge of conspiracy to violate the anti-trust statute, and that most, I think, there is a dispute among lawyers, as we have tried their case, but the meaning of words in that type of dispute is common to our system of law. At the most, I find in the evidence isolated incidents in which never could be drawn, in my judgement, the conclusion that there was a deliberate attempt to monopolize, or to unreasonably restrain trade.

Now, I know that there is great stress placed by Mr. Arnes on the Compton against the Metal Products, Incorporated, and that is 453 F.2D, page 58, Fourth Circuit, 1971, but I read that case completely differently, and I think that it points

up the difficulties that we have in the situation that was brought out on this trial.

In the Compton case, we had a situation where a man was actually taken out of any part of the mining business every place in the world for a period of twenty years.

As far as the misuse of patents, I think this settlement agreement, particularly the 5(b), was one drafted by attorneys, and agreed to, and signed by parties after consultation and knowledge. The patents are set forth separately in paragraph four of the settlement agreement of May 28th, 1971, and it says that Sheridan and National Catheter will not manufacture or sell any products or use any method or process so as to infringe any claim of unexpired patents, or for any invention conceived by Sheridan during his employment with Sherwood.

Now, as I read it, it talks about him being employed by Sherwood, if I read the paragraph correctly.

MR. ARNES: He never was, Your Honor.

THE COURT: Isn't that in that paragraph?

MR. ARNES: I don't believe so. No,

Your Honor. You have to read the paragraph in its entirety.

THE COURT: That is paragraph four.

MR. ARNES: Oh, four? Sheridan and National Catheter agree that they will not manufacture, use, sell or otherwise deal in any product or practice any method or process so as to infringe any claim of any unexpired patent interest which is the subject of this license agreement or any unexpired patent which issues from any application for any invention which Sheridan conceived alone, or with others during the period of his employment by Sheridan and Sheridan Catheter Company is the one that he owned before 1960.

THE COURT: I know.

MR. ARNES: Which had already been assigned by Sheridan under paragraph five of the employment agreement under the obligation of paragraph six of this agreement, and there is no mention --

THE COURT: I misread that, but I think that it shows that there was a different, separate consideration given to the patent, and its licensing, and so forth. And because we have a great similarity with Sherwood and Sheridan, and so forth throughout this trial, at times it is difficult to keep the difference.

But at least I grant the motion, and in respect to Count three, I find no evidence of such interference as alleged, except that there was contact with the American Hospital Supply Corporation, and I am letting thatCount two stand, and I think that you appreciate that I am going to have several questions that cover the contract, and that is intereference with contracts.

On the fourth claim, I think it is a general claim of unfair competition, and that covers the waterfront, and it is based to a large degree upon the same allegations that were set forth in Counts two and three and, again, I find no evidence under the test that I have talked about to support the claim and to hold it up against the motion for a directed verdict.

So to make myself clear: my conclusion is that I grant the motion for a directed verdict as to one, three and four, and deny the motion against the submission of Count two, to the jury, under the special verbiage and provisions of 49(a).